

9-21-2012

Melaleuca, Inc. v. Foeller Clerk's Record v. 2 Dckt. 39757

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LAW CLERK

IN THE
SUPREME COURT

OF THE
STATE OF IDAHO

MELALEUCA, INC.,

VOL. II of IV

Plaintiff and

Respondent and

vs.

RICK FOELLER and NATALIE FOELLER,

COPY

Defendant and

Appellant and

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Jon J. Shindlering, District Judge

Richard Armstrong, KIRTON McCONKIE

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Attorney for Appellant

Richard R. Friess, THOMSEN STEPHENS

2635 Channing Way, Idaho Falls, ID 83404

Attorney for Respondent

Filed this day of, 20

SEP 21 2012

Clerk

Deputy

39757

IN THE SUPREME COURT OF THE STATE OF IDAHO

MELALEUCA, INC.,)	
)	
Plaintiff/Respondent,	)	Case No. CV-2009-2616
)	
vs.	)	Docket No. 39757
)	
RICK FOELLER and NATALIE FOELLER,	)	VOLUME II of IV
)	
Defendants/Appellants.)	
_____)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE JON J. SHINDURLING, District Judge.

Attorney for Appellant

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7TH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

11 OCT 20 P1:37

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,

Plaintiff,

vs.

RICK FOELLER and NATALIE
 FOELLER,

Defendants.

**DEFENDANTS' MOTION FOR
 SUMMARY JUDGMENT**

*(Hearing Date:
 Monday, November 21, 2011, 9:30 a.m.)*

Civil No. CV-09-2616

Judge Jon J. Shindurling

Pursuant to Idaho R. Civ. P. 56, Defendants Rick and Natalie Foeller (the "Defendants"), by and through their counsel of record, hereby move the Court for summary judgment against Plaintiff on each of its claims set forth in Plaintiff's *Complaint and Demand for Jury Trial*.

"Summary judgment dismissal of a claim is appropriate where the plaintiff fails to submit evidence to establish an essential element of the claim." *Nelson By & Through Nelson v. City of Rupert*, 128 Idaho 199, 201, 911 P.2d 1111, 1114 (Idaho 1996), *citing*

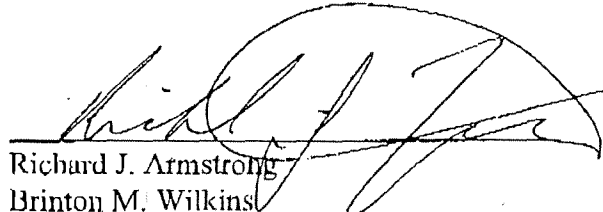
Idaho R. Civ. P. 56(c); and *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (Idaho 1988).

McLalceuca has not produced any non-speculative evidence establishing either the fact or value of any alleged damage. Therefore, Plaintiff cannot establish an essential element of its contract, tort, and equitable claims. Thus, the Complaint should be dismissed in its entirety.

This motion is supported by a memorandum of points and authorities filed concurrently herewith, along with other supporting materials attached to the *Affidavit of Richard J. Armstrong*.

DATED this 20th day of October, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

**DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

CERTIFICATE OF SERVICE

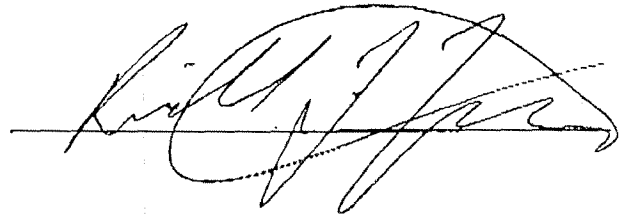
I HEREBY CERTIFY that on the 20th day of October, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** to the following:

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Attorneys for Plaintiff Melaleuca, Inc.



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**DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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STATEMENT OF UNDISPUTED FACTS

1. On or about September 15, 1999, Defendants entered into an Independent Marketing Executive Agreement with Melaleuca of Canada, Inc. *See* Complaint at ¶ 6. A true and correct copy of the Complaint is attached as Exhibit A to the Affidavit of Richard J. Armstrong (“Armstrong Affidavit”), filed contemporaneously herewith. *See also* the *Melaleuca of Canada, Inc. Independent Marketing Executive Agreement* (the “Melaleuca of Canada IMEA Agreement”) and the ancillary *Statement of Policies and Definitions of Terms*, true and correct copies of which are attached to the Armstrong Affidavit as Exhibit B.

2. On April 29, 2009, Plaintiff filed the Complaint in this matter. *See* Armstrong Affidavit, Exhibit A.

3. The Complaint alleges that “Defendants have committed tortious acts directed at Melaleuca, Inc., in the State of Idaho.” *Id.* at ¶ 4.

4. The alleged tortious acts are that Defendants have “interfere[d] with Melaleuca, Inc.’s agreements with its other Independent Marketing Executives (IME’s) and/or Customers.” *Id.* at ¶ 7.

5. The Complaint also alleges that Defendants have violated their Melaleuca of Canada IMEA Agreement. *Id.* at ¶ 8.

6. Finally, the Complaint seeks an order “enjoining Defendants from violating their agreements with Melaleuca, Inc., to include actions in recruiting Melaleuca independent Marketing Executives, clients and Customers in contravention of their agreements.” *Id.* at ¶ 11.

7. The Complaint does not state any specific damages caused by Defendants, nor does the complaint specify a dollar value of any alleged damages. *See* Ex. A, Armstrong Affidavit.

8. Rather, the Complaint generally alleges that “[t]he actions of Defendants have caused, and will continue in the future to cause, injury and damage to Melaleuca, Inc.’s business and will result in loss, damage or other effects as intended by Defendants. Melaleuca, Inc., is entitled to recover from Defendants all past and future costs, damages, and losses incurred as a result of the improper actions of Defendants, in an amount to be proven at the time of trial or at the time judgment is requested.” *Id.* at ¶ 9.

9. Melaleuca testified that it would be difficult to measure and state the amount of its damages, and that therefore it was going to engage a “special consultant” to help or assist Melaleuca in calculating its damages. *See* Exhibit C of Armstrong Affidavit, page 110, lines 19 through 23.

10. Accordingly, on January 25, 2011, Defendants served their *Third Set of Interrogatories and Fourth Requests for Production* upon Plaintiff, requesting Plaintiff to “[s]tate the specific dollar amount of damages [it] claim[s] were caused by Defendants’ alleged violations of Policy 20.” *See* Exhibit D, Armstrong Affidavit, Interrogatory No. 1.

11. Plaintiff responded to this interrogatory as follows: “***Plaintiff*** is in the process of determining the amount of damages caused by Defendants’ alleged violations of Policy 20 and ***will seasonably supplement this answer when the determinations is made.***” *See* Exhibit E, Armstrong Affidavit, at pages 3 through 4 (emphasis added).

12. Defendants also asked: "In relation to this case, state the name, address, and telephone number of each expert witness you intend to designate pursuant to Idaho R. Civ. P. 26(b)(4)." Armstrong Affidavit, Ex. D at page 2.

13. Plaintiff responded: "Plaintiff will provide this information in accordance with the expert witness disclosure cutoff date set forth in the Court's January 25, 2011 Scheduling Order." Armstrong Affidavit, Ex. E at page 4.

14. Defendants also requested that Plaintiff "produce all expert reports that have been prepared in relation to the experts and/or matters identified in Interrogatory Nos. 2-4 above." Armstrong Affidavit, Ex. D at page 2.

15. Plaintiff responded: "Plaintiff will provide the information in accordance with the expert witness disclosure cutoff date in the Court's January 25, 2011 Scheduling Order." Armstrong Affidavit, Ex. E at page 5.

16. Defendants also requested that Plaintiff "produce any and all correspondence, including e-mails and other correspondence, between Melaleuca on one hand and the expert(s) identified in Interrogatory No. 4 above on the other." Armstrong Affidavit, Ex. D at page 3.

17. Plaintiff responded: "Plaintiff objects on the basis that the Request seeks information outside I.R.C.P. 26(b)(1) and on the basis that the information sought is subject to the attorney client and/or work product privilege. Without waiving said objection, see Answer to Interrogatory No. 4 [*i.e.*, Plaintiff will provide this information in accordance with the expert

witness disclosure cutoff date set forth in the Court's January 25, 2011 Scheduling Order."].

Armstrong Affidavit, Ex. E. at page 5.

18. On September 20, 2011, Plaintiff disclosed the identity of its expert witness. This witness was identified as Robert W. Smith. In the expert disclosure, Plaintiff states that Mr. Smith "will offer an expert opinion as to the damages Melaleuca suffered as a result of Foeller's recruitment of Melaleuca Marketing Executives to Max International."

Armstrong Affidavit, Exhibit F thereto.

19. Plaintiff's expert witness disclosure did not contain any expert report or other evidence relating to Plaintiff's damages. *See* Armstrong Affidavit.

20. According to this Court's *Order Setting Pre-Trial Conference and Jury Trial*, entered January 25, 2011, the deadline for completing *all* discovery was seventy days prior to trial – *i.e.*, October 10, 2011. The Court also ordered that all discovery responses were to be due prior to the discovery cutoff date. A true and correct copy of this order is attached to the Armstrong Affidavit as Exhibit G.

21. On December 1, 2010, this Court issued its *Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment* ("SJ Opinion").

22. This SJ Opinion was issued after Plaintiff sought \$23,856.41 from Defendants, generally claiming this was the amount of commissions that Defendants were paid after they had violated Policy 20. A true and correct copy of the SJ Opinion is attached to the Armstrong Affidavit as Exhibit H.

23. In its SJ Opinion, this Court stated:

Melaleuca states that the [\$23,856.41] requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. *This argument is unconvincing based on the evidence currently before this court.* Melaleuca seeks to retroactively take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers' work as contractors for Melaleuca or that these are recognizable damages. Rather, *it appears that, lacking other evidence, Policy 20(c)(1) acts solely to "deter a breach or to punish the breaching party."*

See Armstrong Affidavit, Exhibit H, at page 7-8 (emphasis added).

24. According to the Court, as of December 1, 2010, "[t]here remain[ed] a genuine issue of material fact *as to what damages* Melaleuca suffered as a result of the Foellers' recruitment of Melaleuca customers and executives into Max." See Armstrong Affidavit, Exhibit H, at page 8.

25. As of the cut-off date for all fact and expert discovery, Plaintiff has not disclosed the amount of its damages, and has not produced any expert reports of their expert witness, Mr. Smith, as requested in discovery. See Armstrong Affidavit.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE ON ALL CLAIMS BECAUSE PLAINTIFF HAS NOT SUBMITTED ANY NON-SPECULATIVE EVIDENCE REGARDING THE FACT OR VALUE OF ITS ALLEGED DAMAGES.

"Summary judgment dismissal of a claim is appropriate where the plaintiff fails to submit evidence to establish an essential element of the claim." *Nelson By & Through Nelson v. City of Rupert*, 128 Idaho 199, 201, 911 P.2d 1111, 1114 (Idaho 1996), *citing*

Idaho R. Civ. P. 56(c); *and Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (Idaho 1988).

Therefore, because it has not produced any non-speculative evidence establishing either the fact or value of any alleged damage, Plaintiff cannot establish an essential element of its contract, tort, and equitable claims. Thus, the Complaint should be dismissed in its entirety.

A. Damages is an Essential Element of All of Plaintiff's Asserted Claims.

To prevail on a breach of contract claim, the plaintiff must prove four elements:

(1) a contract existed between plaintiff and defendant; (2) the defendant breached the contract; (3) the plaintiff has been damaged on account of the breach; and (4) ***the amount of the damages***.

See Idaho Civil Jury Instructions, no. 6.10.1. (emphasis added). *See also Bergkamp v. Martin*, 759 P.2d 941 (Idaho Ct. App. 1988) (stating that breach of contract requires proof of damages).

The Complaint asserts intentional interference with a prospective economic advantage and/or tortious interference with contract. Both torts require a plaintiff to establish damages. *See Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 893, 243 P.3d 1069, 1081 (Idaho 2010), *reh'g denied* (Nov. 26, 2010) ("To establish a claim for intentional interference with a prospective economic advantage, [plaintiff] must show: (1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) ***resulting damage*** to the plaintiff whose expectancy has been disrupted.") (emphasis added); *and id.* at 1083, *quoting Bybee v. Isaac*, 145 Idaho 251, 259, 178 P.3d 616, 624 (Idaho 2008) ("Tortious interference with contract has four elements: '(1) the existence of a contract; (2) knowledge of the contract on the

part of the defendant; (3) intentional interference causing a breach of the contract; and (4) *injury to the plaintiff resulting from the breach.*”) (Emphasis added).

Plaintiff’s failure to submit evidence of damages justifies summary judgment in Defendants’ favor.

B. To Establish Damage, a Plaintiff Must Provide Non-Speculative Evidence of Both the Fact of Damages and the Amount of Damages.

A plaintiff must prove the fact that it has been damaged as well as the amount of damages. Furthermore, both must be proven to a reasonable certainty. *See Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997), *citing Wing v. Hulet*, 106 Idaho 912, 919, 684 P.2d 314, 321 (Ct. App. 1984), *and Eliopulos v. Kondo Farms, Inc.*, 102 Idaho 915, 919, 643 P.2d 1085, 1089 (Ct. App. 1982) (“Damages, **and** the amount thereof, must be proven to a reasonable certainty.”) (Emphasis added). Thus, “the measure of damage – as well as the fact of damage – must be proven *beyond speculation.*” *Wing*, 106 Idaho at 919 (emphasis added), *citing Eliopulos*, 102 Idaho 915.

When a plaintiff claims lost profits as damages, the foregoing still applies.

“Compensatory damages for lost profits and future earnings must be shown with a **reasonable certainty.**” *Todd v. Sullivan Const., LLC*, 146 Idaho 118, 122, 191 P.3d 196, 200 (Idaho 2008) (emphasis added), *quoting Inland Group of Companies, Inc. v. Providence Washington Ins. Co.*, 133 Idaho 249, 257, 985 P.2d 674, 682 (Idaho 1999). “Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to *remove the existence of damages from the realm of speculation.*” *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (emphasis added). And “reasonable

certainty requires more than a mere estimate of net profit as a percentage of gross income. There must generally be supporting evidence of overhead expenses or other costs of producing income.” *B & F Inc. v. Intermountain Gas Co.*, 99 Idaho 730, 732, 588 P.2d 458, 460 (1978).

i. ***Plaintiff Has Not Produced Any Non-Speculative Evidence Regarding the Fact of Damage.***

Plaintiff has not, either in deposition or in response to written discovery, produced any non-speculative evidence that Defendants’ alleged actions have actually caused damage. In its Rule 30(b)(6) deposition, Melaleuca was not able to provide any specific testimony regarding damage, and stated that an expert was required to calculate such damages. See Ex. C, Armstrong Affidavit, 110:19-23.

In response to Defendants’ Third Set of Interrogatories and Requests for Production of Documents, Plaintiff again provided no information that could be used to infer the existence or dollar value of the alleged damage. Instead, Plaintiff again responded that the amount of damages would be calculated by an expert and that the expert would be disclosed on September 20, 2011. And although Plaintiff promised to produce not only the dollar amount of its damages by that date, it also represented that it would produce its expert’s report on that same date. Plaintiff has failed to do so. See Armstrong Affidavit. As a result, there is no evidence from which the fact of damage can be inferred.

Thus, the only thing supporting Plaintiff’s claim of damage are the allegations of the Complaint. But, “Rule 56(e) requires a party to respond to a motion for summary judgment with something more than relying on the mere allegations or denials in the pleadings.” *Brown*, 118 Idaho at 833.

And because discovery has ended and these proceedings are at the summary judgment stage, Plaintiff can no longer punt the issue of damages. “[T]he purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain[,] . . . [T]hus, if a party resists summary judgment, it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution by trial.” *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896, 899 (Idaho 1984). Accordingly, “Rule 56(e) requires a party to respond to a motion for summary judgment with something more than relying on the mere allegations or denials in the pleadings. Affidavits or other proof must be presented to the court to set forth the specific facts showing that there is a genuine issue existing for trial.” *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833, 801 P.2d 37, 40 (Idaho 1990). Failure to provide such evidence “exposes a party to the risk of a summary judgment.” *Berg*, 107 Idaho at 444.

Because Plaintiff has not provided any non-speculative evidence of the fact of damage, it has not established an element that is essential to all of Plaintiff’s claims and summary judgment in favor of Defendants is appropriate.

ii. *Plaintiff Has Not Produced Any Non-Speculative Evidence Regarding the Amount of Damage.*

Plaintiff has not produced any evidence regarding the dollar value of its claims. In deposition, Melaleuca testified that it was “[v]ery hard to measure or for me to place a value or project what those damages are. Therefore, we’re going to engage a special consultant to help or assist us in putting a value or a damage assignment.” SOUF at ¶ 13.

Plaintiff has been consistent in its assertion that expert analysis was necessary to determine damages. In response to written interrogatories and requests for production, Plaintiff responded that it was “in the process of determining the amount of damages caused by Defendants’ alleged violations of Policy 20 and will seasonably supplement this answer when the determination is made.” SOUF at ¶ 17. And Plaintiff also stated that it would provide a copy of its expert’s report regarding damages “in accordance with the expert witness disclosure cutoff date in the Court’s January 25, 2011 Scheduling Order.” SOUF at ¶ 25.

While Plaintiff has provided the name and address and *curriculum vitae* of an expert witness, Plaintiff has not provided any expert opinion regarding the amount of Plaintiff’s alleged damages, and has not otherwise supported any such opinion with the materials requested in discovery. According to the January 25, 2011 Scheduling Order, the deadline for completing *all* discovery was October 10, 2011. SOUF at ¶ 28.

Thus, because Plaintiff has not produced any non-speculative evidence of its alleged damage, it has not established an element that is essential to all of its claims and summary judgment in favor of Defendants is appropriate.

II. THIS COURT’S EARLIER OPINION AND ORDER ON SUMMARY JUDGMENT HIGHLIGHTED PLAINTIFF’S NEED TO PRESENT EVIDENCE OF ACTUAL DAMAGES.

As of December 1, 2010, the date of this Court’s SJ Opinion, Plaintiff’s Policy 20, and specifically paragraph 20(c)(1) of that policy, is an illegal penalty as it relates to this case, and does not support Plaintiff’s claim for damages. *See* SJ Opinion, at 8. In its SJ Opinion, this Court ruled:

‘[W]here the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage, and is exorbitant and unconscionable, it is regarded as a ‘penalty’, and the contractual provision therefore is void and unenforceable.’

Armstrong Affidavit, Ex. H, at page 7 (*quoting Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1999)).

This Court ruled further:

Melaleuca states that the amount requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. ***This argument is unconvincing based on the evidence currently before this court.*** Melaleuca seeks to retroactively take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers’ work as contractors for Melaleuca or that these are recognizable damages. Rather, it appears that, lacking other evidence, Policy 20(c)(1) acts solely to ‘deter a breach or to punish the breaching party.’

Armstrong Affidavit, Ex. H, at pages 7-8 (emphasis added).

The Court’s SJ Opinion should have signaled to Plaintiff that it needed to present evidence of actual damages, and that without such evidence, Policy 20(c)(1) is an illegal and unenforceable penalty as it relates to this case. By virtue of the Court’s SJ Opinion, Plaintiff cannot solely rely on the amount of commissions paid to Defendants as proof of its damages. Nothing has changed in this case from an evidentiary standpoint since the SJ Opinion. As of December 1, 2010, Plaintiff had not produced any evidence of actual damages, other than to argue that its damages were in the amount of commissions the Foellers had been paid during the time they allegedly violated Policy 20. Plaintiff has not supplemented its damages claim with any evidence of actual damages. Plaintiff has still not shown that the commissions sought by Plaintiff as damages were not tied to profitable sales as a result of Defendants’ work for

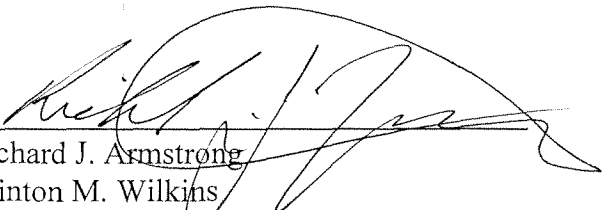
Melaleuca, or that the commissions are otherwise recognizable damages. The time for producing such evidence expired on October 10, 2011. Therefore, given this failure of proof, summary judgment is appropriate in favor of Defendants.

CONCLUSION

For at least the foregoing reasons, Defendants are entitled to summary judgment on all claims asserted by Plaintiff.

DATED this 20th day of October, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

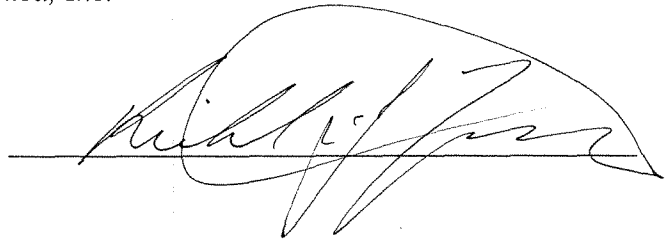
I HEREBY CERTIFY that on the 20th day of October, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing ***MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*** to the following:

James R. Holman
Richard R. Friess
THOMSEN STEPHENS LAW OFFICES PLLC
2635 Channing Way
Idaho Falls, Idaho 83404
rfriess@ts-lawoffice.com

Brent Manning
MANNING CURTIS BRADSHAW & BEDNAR LLC
170 South Main Street, Suite 900
Salt Lake City, Utah 84101
bmanning@mc2b.com

Joshua K. Chandler
MELALEUCA, INC.
3910 South Yellowstone Highway
Idaho Falls, ID 83402
jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard R. Friess", is written over a horizontal line.

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WOOD JENKINS LLC
Richard J. Armstrong ISBN 5548
Brinton M. Wilkins (admitted *pro hac vice*)
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
rjarmstrong@woodjenkinslaw.com

2011 OCT 21 PM 1:44

CLERK OF DISTRICT COURT
HARRIS COUNTY DIVISION
SPRINGVILLE COUNTY
IDAHO

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
	)	AFFIDAVIT OF RICHARD J.
Plaintiff,	)	ARMSTRONG
)	
vs.)	
	)	Civil No. CV-09-2616
RICK FOELLER and NATALIE)	
FOELLER,	)	Judge Jon J. Shindurling
)	
Defendants.)	
)	
)	

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

RICHARD J. ARMSTRONG, being first duly sworn, deposes and says:

1. I am over the age of 18 years old and am competent to testify to the matters stated herein.
2. I am an attorney for Defendants Rick Foeller and Natalie Foeller in the above-captioned case.

3. Attached hereto as Exhibit A is a true and correct copy of the *Complaint and Demand for Jury Trial* in this matter.

4. Attached hereto as Exhibit B is a true and correct copy of the *Melaleuca of Canada IMEA Agreement* and Melaleuca's *Statement of Policies and Definitions of Terms*.

5. Attached hereto as Exhibit C is a true and correct copy of relevant portions of the Rule 30(b)(6) deposition of Melaleuca, Inc.

6. Attached hereto as Exhibit D is a true and correct copy of Defendants' *Third Set of Interrogatories and Fourth Requests for Production* and accompanying *Certificate of Service*.

7. Attached hereto as Exhibit E is a true and correct copy of Plaintiff's answers to Defendants' *Third Set of Interrogatories and Fourth Requests for Production*.

8. Attached hereto as Exhibit F is a true and correct copy of Plaintiff's *Expert Witness Disclosure*.

9. Plaintiff's expert witness disclosure did not contain any expert report or other evidence relating to Plaintiff's damages.

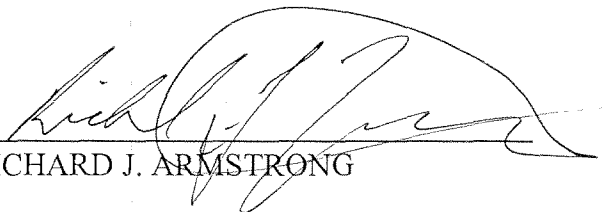
10. Attached hereto as Exhibit G is a true and correct copy of this Court's *Order Setting Pre-Trial Conference and Jury Trial*, entered January 25, 2011.

11. Attached hereto as Exhibit H is a true and correct copy of this Court's December 1, 2010, *Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment*.

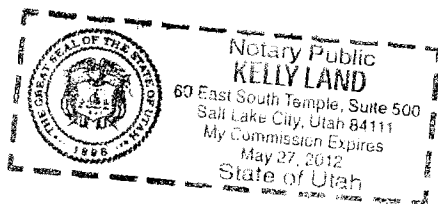
**AFFIDAVIT OF
RICHARD J. ARMSTRONG**

12. As of October 10, 2011, the cut-off date for all discovery, Plaintiff has not disclosed the amount of its damages, and has not produced any expert reports of their expert witness, Mr. Smith, as requested in discovery.

DATED this 20th day of October, 2011.


RICHARD J. ARMSTRONG

SUBSCRIBED AND SWORN TO before me this 20th day of October, 2011.




NOTARY PUBLIC

**AFFIDAVIT OF
RICHARD J. ARMSTRONG**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of October, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing

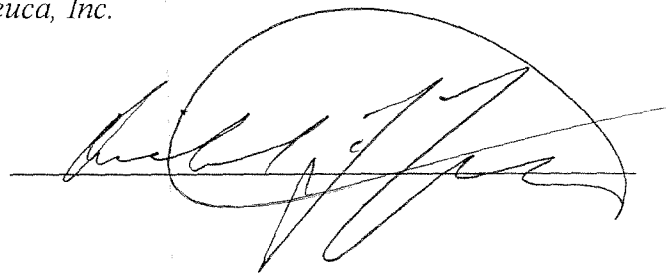
AFFIDAVIT OF RICHARD J. ARMSTRONG to the following:

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Joshua K. Chandler
MELALEUCA, INC.
3910 South Yellowstone Highway
Idaho Falls, ID 83402
jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard J. Armstrong", is written over a horizontal line.

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***AFFIDAVIT OF
RICHARD J. ARMSTRONG***

EXHIBIT A

COPY
CASE ASSIGNED TO
JUDGE JON J. SHINDURLING

2009 APR 29 PM 4:21

Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, P.L.L.C.
2635 Channing Way
Idaho Falls, ID 83404
Telephone (208) 522-1230
Fax (208) 522-1277

FILED AT
CLERK OF DISTRICT COURT
BONNEVILLE COUNTY
IDAHO

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)

Plaintiff,)

v.)

RICK FOELLER and NATALIE FOELLER,)

Defendants.)

Case No. CW-09-2616

COMPLAINT AND DEMAND
FOR JURY TRIAL

COMES NOW plaintiff Melaleuca, Inc., by and through counsel of record, and for cause of
action against Defendants, alleges as follows:

1. Melaleuca, Inc., is an Idaho corporation with its principal place of business in
Bonneville County, State of Idaho. Bonneville County, State of Idaho is the place of principal injury
or damage related to the actions of Defendants therein.

1 - COMPLAINT AND DEMAND FOR JURY TRIAL

2 Defendants Rick and Natalie Foeller are residents of Ontario, Canada.

3 Defendants have maintained business contacts with the State of Idaho, out of which arise of operative facts pertaining to the present action, have contracted with Melaleuca, Inc., in the State of Idaho, have been trained in the State of Idaho, and have sent money to and received products and substantial commissions from the State of Idaho. Defendants are therefore personally subject to jurisdiction of the courts of the State of Idaho pursuant to Idaho Code §5-514 and the due process clause of the Fifth Amendment to the United States Constitution.

4 Defendants have committed tortious acts directed at Melaleuca, Inc., in the State of Idaho, and have intended to and have caused damage to Melaleuca, Inc., in the State of Idaho. Defendants are subject to jurisdiction of the courts of the State of Idaho for this additional reason, pursuant to Idaho Code §5-514 and the due process clause of the Fifth Amendment to the United States Constitution.

5 Defendants have expressly consented to personal jurisdiction by the Courts of the State of Idaho over disputes such as this one, which turn on violations of Melaleuca's contractual prohibition against Marketing Executives recruiting Melaleuca Customers for another business.

6 On or about September 15, 1999, Defendants entered into an Independent Marketing Executive Agreement (IMEA) with Melaleuca, Inc., and Defendants functioned thereafter as independent contractors acting through the agreement with Melaleuca, Inc. Defendants agreed to comply with and honor the IMEA terms and conditions, as well as Policies, as they were in existence, and as further amended, both during their relationship with Melaleuca, and, with respect to some Policies, after any termination of the Independent Marketing Executive Agreement relationship.

7 In November 2008, Defendants terminated their IMEA. Shortly thereafter, Melaleuca notified Defendants that they had violated the terms and conditions of that agreement. The activities of Defendants before and since November 2008 have been directed at Melaleuca, Inc., with the intent to interfere with Melaleuca, Inc.'s agreements with its other Independent Marketing Executives (IME's) and/or Customers.

8 Defendants have, in violation of their agreements, and in violation of controlling law, used confidential and proprietary business information and trade secrets in an effort to raid their former business organization's IME's and Customers and to persuade those persons to leave Melaleuca and go to their new business in Max International ("Max"). Defendants willfully violated the policies of Melaleuca, Inc., in their activities, including Policy 20, concerning non-solicitation of Melaleuca Marketing Executives and Customers, and policies prohibiting the use and dissemination of confidential and proprietary information, and intentionally and tortiously interfered with Melaleuca, Inc.'s agreements with other Melaleuca IME's and/or Customers.

9 The actions of Defendants have caused, and will continue in the future to cause, injury and damage to Melaleuca, Inc.'s business and will result in loss, damage or other effects as intended by Defendants. Melaleuca, Inc., is entitled to recover from Defendants all past and future costs, damages, and losses incurred as a result of the improper actions of Defendants, in an amount to be proven at the time of trial or at the time judgment is requested.

10 The amount in controversy is in excess of \$10,000, and is otherwise sufficient to confer jurisdiction in the District Court and not the Magistrate's Division of the District Court.

1 Melaleuca, Inc., is further entitled to an order from this Court enjoining Defendants from violating their agreements with Melaleuca, Inc., to include actions in recruiting Melaleuca independent Marketing Executives, clients and Customers in contravention of their agreements. The actions of Defendants have caused, and will in the future cause, irreparable injury and harm to Plaintiff.

2 Melaleuca, Inc., is further entitled to recover its attorney fees and court costs incurred therein in prosecuting this action pursuant to Idaho Code sections 12-120 and 121, and per the controlling agreements.

3 WHEREFORE, plaintiff Melaleuca, Inc. requests the judgment, order and decree of this court against Defendants, as follows:

1 For judgment against Defendants for past and future costs, losses and damages sustained by Melaleuca, Inc., as a result of the improper and unlawful actions identified above;

2 For a preliminary and permanent injunction directing Defendants to cease and desist from raising Melaleuca independent Marketing Executives, clients and Customers, for the time periods agreed by Defendants, which time period should begin to run from the time of judgment in order to give Melaleuca the compliance agreed, for the time period agreed, without violation;

3 For an award of Plaintiff's attorney fees;

4 For an award of Plaintiff's cost of suit incurred therein;

5 Plaintiff reserves the right to seek punitive damages under the provisions of Idaho statute by subsequent motion and order; and

6. For such other and further relief as the court deems just and equitable under the circumstances.

DATED this 29th day of April, 2009.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By: 

T. Jason Wood, Esq.

DEMAND FOR JURY TRIAL

Plaintiff Melaleuca, Inc., requests trial by jury of not less than 12 persons as to all issues triable to a jury in this matter.

DATED this 29th day of April, 2009.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By: 

T. Jason Wood, Esq.

EXHIBIT B

Independent Marketing Executive Agreement

Terms and Conditions

(please read carefully)

Terms used, but not defined herein shall have the meanings as described in Melaleuca's Definitions of Terms.

1. I am competent and of legal age to enter into binding contracts in the province in which I enter this Agreement with Melaleuca of Canada.

2. This Agreement will continue so long as I continue to accept commissions and bonuses or other payments from Melaleuca or until this Agreement is canceled by me or by Melaleuca pursuant to the terms hereof or of the Statement of Policies.

3. Neither I nor my spouse has been a Melaleuca Independent Marketing Executive and has not owned, had ownership, affiliation with, or operated any Melaleuca business in the past six months.

4. I understand that as a Marketing Executive I am an independent contractor, and not an agent, employee, legal representative or franchisee of Melaleuca. I further understand and agree that I will not be treated as an employee for United States federal or state or Canadian federal or provincial tax purposes, nor for purposes of the United States Federal Unemployment Tax Act, the United States Federal Insurance Contributions Act, the United States Social Security Act, United States State Unemployment Acts, United States State Employment Security Acts, United States State Workers Compensation Acts, Canadian Federal or Provincial Pension Plan Contributions Acts or Requirements, Canadian Federal or Provincial Unemployment Insurance Acts or Requirements, Canadian Provincial Employment Standards Acts, Canadian Federal or Provincial Worker's Compensation Acts or Requirements, or Canadian Provincial Health Tax Acts or Requirements. I agree to pay all applicable United States federal and state and Canadian federal and provincial income taxes, self-employment taxes, sales taxes, local taxes and/or local license fees that may become due as a result of my activities under this Agreement.

5. I understand that the acceptance of this Agreement by Melaleuca does not constitute the sale of a franchise and that there are no exclusive territories granted to anyone. I also understand that I am not acquiring any interest in a security.

6. I understand that my success as a Marketing Executive is dependent upon my own efforts and skills. I do not anticipate receiving profits as a result of the efforts of any individual or entity other than myself.

7. As a Marketing Executive I will use my best efforts to develop and service at least one active Direct or Preferred Customer.

8. I understand that products representing at least 70% of my monthly Organization Base Points must be sold to End Consumers each month. I will not purchase any product from Melaleuca solely for the purpose of qualifying for commissions or bonuses.

9. It will be allowed to buy products at the prices set forth in the Melaleuca Preferred Customer Price List according to my status as either a Direct or Preferred Customer.

10. I understand that Melaleuca makes no claims or warranties of any kind including, but not limited to, any claims for earnings, medical, weight loss or health benefits concerning its products, other than those included in Melaleuca's official written literature. I will not create, publish or distribute any literature or materials representing Melaleuca or its products other than that which is provided by Melaleuca.

11. If I fail to pay for products or services on or before the due date, Melaleuca is authorized to withhold the appropriate amounts from my commission and bonus checks or withdraw the appropriate amounts from my credit card/electronic checking accounts, if any, which I have authorized Melaleuca to charge.

Please call this information in to Melaleuca, Inc. within 24 hours. To expedite the Independent Marketing Executive Agreement please call: 1-800-262-0600. Then mail the completed application to 3910 South Yellowstone Hwy., Idaho Falls, Idaho 83402-6003. No commission or bonus checks will be sent to the applicant until Melaleuca receives the signed original Independent Marketing Executive Agreement.

12. Melaleuca will not be responsible for the loss of any commissions or bonuses or other payments because of errors or delays in receiving agreements, orders, changes or other necessary information.

13. I have carefully reviewed the Melaleuca Compensation Plan, Statement of Policies and Definitions of Terms and acknowledge that they are incorporated as part of this Agreement in their present form and modified from time to time by Melaleuca at its sole discretion.

14. Upon notification to its Marketing Executives, Melaleuca may, at its discretion, amend the Melaleuca Compensation Plan, Statement of Policies, Definitions of Terms and/or terms of the Customer Agreement and this Independent Marketing Executive Agreement. I agree to abide by any and all such amendments. The continuation of my Melaleuca business or my acceptance of commission and/or bonus checks or other payments from Melaleuca constitutes my acceptance of any such amendments.

15. My violation of any of the terms of this Agreement or the Statement of Policies may result, at Melaleuca's discretion, in forfeiture of commission and bonus checks or other payments from Melaleuca on all or part of my Marketing Organization, cancellation of this Agreement, or other corrective action as specified in the Statement of Policies.

16. I may cancel this Agreement for any reason at any time by giving written notice to Melaleuca bearing my original signature, printed name, address and Customer Number. Written cancellations will be effective upon receipt by Melaleuca, Inc. Cancellation notices must be mailed to: Melaleuca of Canada, Inc., 3910 S. Yellowstone Hwy., Idaho Falls, ID 83402-6003. Faxed cancellations cannot be accepted.

17. This Agreement, the Melaleuca Compensation Plan, the Statement of Policies and the Definitions of Terms constitute the entire agreement between Melaleuca and me and no other promises, representations, guarantees or agreements of any kind will be valid unless in writing and officially authorized by Melaleuca. This provision does not in any way limit Melaleuca's ability to unilaterally amend or modify this Agreement, the Melaleuca Compensation Plan, the Statement of Policies and the Definitions of Terms without my prior written consent.

18. If any provision of this Agreement is held to be invalid all other provisions shall remain valid and enforceable.

19. The term of this Agreement is one year. This Agreement will be automatically renewed annually on each anniversary date of the acceptance of this Agreement by Melaleuca, unless otherwise canceled. This Agreement shall not be deemed accepted by Melaleuca until Melaleuca has received the signed original of this Agreement and I have enrolled at least one Customer and received my first commission check.

20. This Agreement will be governed by the laws of the State of Idaho and any claims or disputes between the parties to this Agreement will be brought in Bonneville County District Court in Idaho Falls, Idaho, or in the U.S. District Court for the District of Idaho.

21. The prevailing party to any lawsuit relating to the violation or enforcement of any provision of this Agreement or any provision or policy contained in the Statement of Policies will be entitled to an award of attorneys' fees and litigation costs.

STATEMENT OF POLICIES AND DEFINITIONS OF TERMS

STATEMENT OF POLICIES

Capitalized terms used in the Statement of Policies have the meanings set forth in the Definitions of Terms.

1. Becoming a Customer

To become a Customer, a person must: (a) have an Enroller who has submitted an Independent Marketing Executive Agreement; (b) sign and submit a Customer Membership Agreement, marking either the "Direct Customer" or "Preferred Customer" box; and (c) pay a membership fee for the cost of enrollment, product information, and other literature that Customers receive throughout the year. Preferred Customers receive a number of additional benefits and may purchase products directly from Melaleuca at 30% to 40% below the Suggested Retail Price. In return for this added discount, Preferred Customers agree to purchase Melaleuca products totaling at least 35 Product Points each month. Customers are not authorized to market or resell Melaleuca products unless they have also signed and submitted an Independent Marketing Executive Agreement.

2. Becoming a Marketing Executive

To become a Marketing Executive, a person must first (a) have an Enroller who has submitted an Independent Marketing Executive Agreement; (b) sign and submit an Independent Marketing Executive Agreement; and (c) purchase a Business Kit. Once those steps are completed the applicant is authorized to market and resell Melaleuca products and to enroll Customers and Marketing Executives. However, an applicant does not become a Marketing Executive, until: (i) Melaleuca receives the applicant's Independent Marketing Executive Agreement; (ii) the applicant has a Customer or Marketing Executive in his/her Marketing Organization; and (iii) the applicant receives his/her first commission check. Marketing Executives may purchase products directly from Melaleuca at the Direct Customer price. Marketing Executives may also choose to be Preferred Customers, in which case they may purchase products directly from Melaleuca at the Preferred Customer price. Purchase of a Business Kit is optional in North Dakota.

3. Individuals, Corporations, Tax Exempt Entities and Trusts

Melaleuca will only consider for acceptance as Marketing Executives individuals or entities that fall into one of the following categories:

- (a) Individuals who are of the legal age.
- (b) Married couples of which at least one is of legal age.
- (c) Corporations in good standing in the state, province, or country of their incorporation which have as their sole shareholder(s), director(s) and officer(s) either one unmarried individual or a married couple.
- (d) Tax exempt entities which are registered and approved as tax exempt institutions under Section 501(c)(3) of the United States Internal Revenue Code or under Section 248(1) of the Income Tax Act of Canada.
- (e) Trusts established in accordance with Melaleuca guidelines.
- (f) Charitable giving corporations established in accordance with Melaleuca guidelines.

4. Customer Numbers

Customers and Marketing Executives may not use or submit to Melaleuca any Social Security Number, Social Insurance Number, portion of Social Insurance Number, Tax Revenue Number, Taxpayer Identification Number or Corporate Account Number other than the actual number assigned to the Customer or Marketing Executive by the proper governmental authority.

5. Proper Completion of Documents

All agreements must be completely and properly filled out and signed. No copies or alterations will be accepted. If any agreement is altered in any way the agreement will not be deemed accepted by Melaleuca except in its original unaltered form, regardless of passage of time or payment of commissions by Melaleuca. Melaleuca will not be responsible for loss of commissions or bonuses or for delays in Customer or Marketing Executive registrations or orders due to: (a) errors by Customers or Marketing Executives in preparing or sending

agreements, orders or other documents; (b) delays or errors caused by the mail or fax transmission; (c) nonreceipt of documents by Melaleuca; (d) illegible or incomplete information on agreements, orders or other documents; or (e) the inability of Customers or Marketing Executives to reach Melaleuca by telephone or fax during busy calling periods.

Melaleuca will process and credit orders and enrollments in the calendar month in which they are received by Melaleuca.

6. Ordering

Melaleuca encourages Customers to order early in the month. All orders are credited to the calendar month in which they are received by Melaleuca. For purposes of product orders, the calendar month ends on the first day of the following month at 4:00:00 a.m. Mountain Time and begins on the first day of the month at 4:00:01 a.m. Mountain Time. Orders may be placed by telephone, mail, fax or the Internet. All telephone or fax orders must be paid by Visa, MasterCard, Discover/Novus (U.S. only), or electronic checking. Orders by mail may be paid by check, money order, Visa, MasterCard, Discover/Novus (U.S. only) or electronic checking. When paying with a credit card, the card number and expiration date must be included. Customers and Marketing Executives will be charged \$10^{us}/\$15^{can} for checks returned for insufficient funds.

Orders for products will usually be processed by Melaleuca within 48 hours of receipt. Shipment will be by common carrier and delivery should be expected within 3 to 10 days. Orders placed during the last week of the month may be delayed due to the large volume of orders received at the end of the month.

7. Customer Satisfaction Guarantee

If for any reason any Customer is not completely satisfied with any product purchased by such Customer from Melaleuca, Melaleuca will replace it without charge or place a credit on the Customer's Melaleuca account for the amount of the purchase price of the product or, upon receipt of a written request from the Customer together with a copy of the invoice from Melaleuca, refund the purchase price (less shipping and handling charges), upon its return within 60 days of purchase.

Unless the Customer requests otherwise, Melaleuca will credit the Customer's Melaleuca account for the purchase price of the returned product. This credit can be redeemed for Melaleuca merchandise at any time. If a Customer has unredeemed credit on account with Melaleuca which is more than six months old, Melaleuca will make an effort to locate the Customer and advise him/her in writing of the credit that is on account and will continue to make such attempts on a monthly basis. Melaleuca will charge the Customer's account a \$10^{us}/\$15^{can} service fee for each month's notification process. If a Customer requests a cash refund, Melaleuca will send the Customer a refund check. Refund checks that remain uncashed for more than 180 days will not be honored and the amount of the check (less a processing fee of \$15^{us}/\$22.50^{can} and a bank cancellation/stop payment fee of \$10^{us}/\$15^{can}) will be credited to the Customer's account. This credit on account will be subject to the above notification process and associated service fees.

8. Returns and Product Point Adjustments

Career/Value Pack Returns: Individual products that are purchased as part of a Career, Value, or other "special" pack which is priced below the Preferred Customer price, can be returned for an exchange but not for a refund unless the entire pack is returned. Career and Value Pack commissions will be deducted from the Marketing Executive's check in the month the Career or Value Pack is returned by the Customer.

Marketing Executives receive commissions based on actual sales of product to End Consumers. When product is returned to Melaleuca, the commissions attributable to that product will be deducted from the commission checks of the Customer's Support Team in the month that the return occurs. If the return occurs within 6 months of the purchase date, then commissions will be deducted from the commission checks of the Support Team of the Marketing Organization that existed at the time of the purchase. Otherwise, commissions will be deducted

from the commission checks of the Support Team of the current Marketing Organization.

Melaleuca reserves the right to terminate the Independent Marketing Executive Agreement or cancel the Customer Membership Agreement of any Marketing Executive or Customer who abuses the Melaleuca Satisfaction Guarantee and Return Policy by excessively returning products.

9. Business Kit Refund

When a Marketing Executive applicant enrolls and purchases a Business Kit, the Business Kit number will be registered at Melaleuca in the applicant's name. If a Marketing Executive applicant cancels his/her Independent Marketing Executive Agreement and returns his/her purchased Business Kit to Melaleuca within 120 days after the Marketing Executive applicant's date of enrollment, Melaleuca will give such Marketing Executive applicant a full refund for the cost of the Business Kit. A refund will only be sent to the Marketing Executive applicant in whose name the Business Kit number is registered. This policy will apply whether the Marketing Executive applicant purchases the Business Kit directly from Melaleuca or from his/her Enroller. A Marketing Executive who purchases Business Kits for resale to Marketing Executive applicants may return unsold kits to Melaleuca for a refund only if the Marketing Executive cancels his/her Independent Marketing Executive Agreement and returns the Business Kits within 120 days after their date of purchase. Marketing Executives who purchase Business Kits for resale may resell such kits for up to one year from their date of purchase from Melaleuca. Melaleuca encourages Marketing Executives to keep such Business Kits updated until they are sold. A Business Kit may only be sold once. Melaleuca updates and revises Business Kits from time to time. Marketing Executives are encouraged to keep their Business Kits current by purchasing update packets or new Business Kits as they become available. Outdated or old Business Kits may not be exchanged for current Business Kits.

10. Election to Cancel Agreements

A Marketing Executive may cancel his/her Independent Marketing Executive Agreement, and a Customer may cancel his/her Customer Membership Agreement, for any reason at any time by giving written notice to Melaleuca bearing his/her original signature, printed name, address, Customer Number and reason for canceling (to assist Melaleuca in improving its customer service). If an individual or entity is a Preferred Customer and a Marketing Executive, the letter should specify which agreement(s) should be canceled. Written cancellations received by Melaleuca on or before the 25th of the month will be effective the month received. Written cancellations received by Melaleuca after the 25th of the month will be effective the following month. Cancellation notices must be mailed to: Melaleuca, 3910 S. Yellowstone Hwy., Idaho Falls, ID 83402-6003.

11. Cancellation Refund Policy

Melaleuca will repurchase from Marketing Executives who have canceled their Independent Marketing Executive Agreements all unencumbered products which are in resalable condition which were purchased by the Marketing Executive from Melaleuca within the previous 12 months, at a price of not less than ninety percent (90%) of the original net cost to the Marketing Executive. All products or materials must be returned to Melaleuca with shipping prepaid by the Marketing Executive in order to receive the above refund. Melaleuca will charge back all commissions, bonuses and rebates paid by Melaleuca relating to the purchases of those products.

12. Cancellation Refund Policy (for Georgia Residents Only)

Melaleuca will repurchase from Marketing Executives who have canceled their Independent Marketing Executive Agreements pursuant to Policy 10 all unencumbered products, sales aids and literature which are in reasonably resalable or reusable condition which were purchased by the Marketing Executive from Melaleuca, at a price of not less than ninety percent (90%) of the original net cost to the Marketing Executive. Goods shall be deemed "resalable or reusable" if the goods are in an unused, commercially resalable condition at the time the goods are returned to Melaleuca. In addition, Melaleuca will repay ninety percent (90%) of the fees paid by the Marketing Executive for services which have not been provided to the Marketing Executive at the time of cancellation. All products or materials must be returned to Melaleuca shipping prepaid by the Marketing Executive in order to receive the above refund. Melaleuca will charge back all commissions, bonuses and rebates paid by Melaleuca relating to purchases of products or services for which refunds are given under this policy.

13. Errors or Questions

Marketing Executives should notify Melaleuca immediately of any errors or questions about commissions, bonuses, Monthly Business Reports, orders or charges. Melaleuca will correct any errors reported to it within 60 days, but Melaleuca will not be responsible for any errors, omissions or problems not reported within 60 days.

14. Joint Ownership of a Business

Independent Melaleuca Businesses may only be owned by an individual or a married couple, or by corporations, tax exempt entities or trusts that comply with Melaleuca guidelines. If a couple who jointly own an Independent Melaleuca Business divorce, they may apply to have the Independent Melaleuca Business transferred to one of them as the sole owner. The divorced couple must submit to Melaleuca a written request specifying to which person the Independent Melaleuca Business will be transferred. The request must either contain the notarized signature of both parties or contain the notarized signature of at least one party and include a certified copy of the court approved divorce decree or property settlement that designates to which party the Independent Melaleuca Business should be transferred. Melaleuca is not bound by any such request or court decree and retains the right to approve or disapprove of such transfer request at its sole discretion. If the transfer is approved, the person to whom the Independent Melaleuca Business is being transferred must sign and submit to Melaleuca a new Independent Marketing Executive Agreement.

15. One Business per Person or Couple

A Marketing Executive may not own, operate or have a financial interest in more than one Independent Melaleuca Business without Melaleuca's express written approval. With regard to married couples and non-married cohabiting couples, both persons will be treated as a single Marketing Executive for purposes of Melaleuca's policies. Therefore, for example, if one person owns an Independent Melaleuca Business the other person may not own, operate or have a financial interest in a separate Independent Melaleuca Business. Additionally, if the couple jointly owns an Independent Melaleuca Business, neither person may own, operate or have a financial interest in a separate Independent Melaleuca Business. However, if two people who own separate Independent Melaleuca Businesses marry, they may each retain ownership of their businesses.

16. Conduct of Household Members

If any member of the Marketing Executive's Immediate Household engages in any activity which, if performed by the Marketing Executive, would violate any Melaleuca policy or any provision of the Independent Marketing Executive Agreement, such activity will be deemed a violation by the Marketing Executive.

17. Inheritance of Business

An Independent Melaleuca Business may be inherited by a single person, a married couple or a trust which complies with Melaleuca's guidelines, pursuant to a valid will or other appropriate document, or in accordance with the intestacy laws of the state, province, or country in which the Marketing Executive resides. A person who inherits an Independent Melaleuca Business must furnish Melaleuca with proper documentation that he/she is the beneficiary and is authorized to represent the estate. He/she must also execute a Customer Membership Agreement and an Independent Marketing Executive Agreement, fulfill all of the functions of a Marketing Executive and abide by the terms of Melaleuca's Statement of Policies.

18. Sale or Transfer of Business

Before a Marketing Executive can sell or transfer his/her Independent Melaleuca Business (except for transfers by inheritance pursuant to Policy 17) all of the following requirements must be met:

- (a) The transfer must be approved in writing by Melaleuca as being in the best interest of all parties involved, including the transferor, the transferee, Melaleuca and the members of the Marketing Organization of the transferor.
- (b) The transfer must not constitute the purchase of status or position by the transferee. The Marketing Executive's actual status must equal the potential status which the Marketing Executive could attain based on his/her Organization Product Points at the time of the transfer and for a reasonable period prior to the transfer, and the transferor Marketing Executive must have been the actual Enroller of all Personal Enrollees and must have been actively involved in working with his/her personal directors. Marketing Executives may not contract or agree with or allow another person to work

- their Independent Melaleuca Business to bring it up to its potential status or offer to sell their business to another person on the condition that such person bring the business up to its potential status.
- (c) Completed original signed and notarized Organization Sale Request and Organization Purchase Request forms must be submitted to and accepted by Melaleuca.
 - (d) The transferee of the business must have completed and submitted to Melaleuca an Independent Marketing Executive Agreement.
 - (e) The transferee of the business has undergone, or will agree to undergo, such training and orientation as Melaleuca may require commensurate with the size of the business being purchased.
 - (f) The transferor Marketing Executive and the Independent Melaleuca Business must have been in compliance with all of Melaleuca's policies and the terms of the Independent Marketing Executive Agreement for the entire twelve month period preceding the transfer including the month in which the transfer occurs.
 - (g) Independent Melaleuca businesses that have or have had a total group volume of 5,000 Product Points or more may not be transferred to any other party as any such transfer would constitute the purchase of status or position.

19. Transfer from Original Organization

Marketing Executives and Customers may transfer from one Melaleuca organization to another only upon fulfillment of all of the following requirements:

- (a) The Marketing Executive or Customer seeking the organization change has submitted an Organization Change form with the original signatures of the seven Marketing Executives in the immediate seven generations above the Marketing Executive or Customer seeking the change. Faxes or photocopies of the executed Organization Change form will not be accepted;
- (b) A Marketing Executive seeking the organization change has no more than 10 Customers in his/her existing Marketing Organization and will have no more than 10 Customers in the Marketing Organization into which he/she is seeking to be moved;
- (c) The Marketing Executive or Customer seeking the organization change has paid to Melaleuca the applicable fee charged by Melaleuca for organization changes;
- (d) Melaleuca has approved the change in writing, which approval Melaleuca may withhold in its sole discretion.

20. Non-Solicitation and Conflicts of Interest

Marketing Executives are independent contractors and may be active in other business ventures while they are Marketing Executives for Melaleuca. However, to qualify for compensation under Melaleuca's Compensation Plan, Marketing Executives have the ongoing responsibility to service, supervise, motivate, train and assist the Marketing Executives in their Marketing Organizations. They also have the responsibility to promote Melaleuca products and the Melaleuca income opportunity. Melaleuca and its Marketing Executives have made a great investment in the establishment of organizations consisting of Customers and Marketing Executives. This constitutes one of Melaleuca's most valuable assets. Melaleuca reserves the right to cease paying compensation to any Marketing Executive who recruits any Melaleuca Customer or Marketing Executive to participate in another business venture. In order to protect the efforts of all Marketing Executives in building and maintaining their individual Marketing Organizations and Customer bases, and in order to protect Melaleuca's interest in the overall Customer base, Marketing Executives and all members of their Immediate Household are required to abide by the following policies:

- (a) Non-Solicitation of Melaleuca Customers and Marketing Executives:
 - (i) During the period that their Independent Marketing Executive Agreements are in force Marketing Executives and all members of their Immediate Household are prohibited from directly, indirectly or through a third party recruiting any Melaleuca Customers or Marketing Executives to participate in any other business venture.
 - (ii) For a period of twelve months after cancellation or termination for any reason of a Marketing Executive's Independent Marketing Executive Agreement, the Marketing Executive and all members of his or her Immediate Household are prohibited from directly, indirectly or through a third party recruiting to participate in any other business venture any Melaleuca Customers or Marketing Executives
 - (1) who were in the Marketing Executive's Marketing Organization or

Support Team at any time during the term of his or her association with Melaleuca;

- (2) with whom the Marketing Executive had contact during the term of his or her association with Melaleuca;
- (3) whose contact information (name, address, phone number or email address, etc.) the Marketing Executive or members of his or her Immediate Household has obtained at any time during the term of his or her association with Melaleuca; or
- (4) whose contact information (name, address, phone number or email address, etc.) the Marketing Executive or members of his or her Immediate Household obtained at any time from another person who obtained the information because of any other person's association with Melaleuca.

The prohibitions under clauses (a)(i) and (ii) above include but are not limited to, presenting or assisting in the presentation of other business ventures to any Melaleuca Customer or Marketing Executive or implicitly or explicitly encouraging any Melaleuca Customer or Marketing Executive to join any other business ventures. It is a violation of this policy to recruit a Melaleuca Customer or Marketing Executive to participate in another business venture even if the Marketing Executive does not know that the prospect is also a Melaleuca Customer or Marketing Executive. It is the Marketing Executive's responsibility to first determine whether the prospect is a Melaleuca Customer or Marketing Executive before recruiting the prospect to participate in another business venture.

(Please refer specifically to the definition of "recruit" in the Definitions of Terms at the end of these Policies.)

- (b) During the period that their Independent Marketing Executive Agreements are in force, and for a period of twelve months after the cancellation or termination thereof for any reason, Marketing Executives and all members of their Immediate Household are further prohibited from the following:
 - (i) Producing any literature, tapes or promotional material of any nature (including but not limited to websites and emails) which is used by the Marketing Executive or any third person to recruit Melaleuca Customers or Marketing Executives to participate in another business venture;
 - (ii) Selling, offering to sell, or promoting any competing products or services to Melaleuca Customers;
 - (iii) Offering any non-Melaleuca products, services or business ventures in conjunction with the offering of Melaleuca products, services or income opportunity or at any Melaleuca meeting, seminar, launch, convention, or other Melaleuca function.
- (c) (i) Violation of any provision of this Policy 20 constitutes a Marketing Executive's voluntary resignation and cancellation of his/her Independent Marketing Executive Agreement, effective as of the date of the violation, and the forfeiture by the Marketing Executive of all commissions or bonuses payable for and after the calendar month in which the violation occurred.
- (ii) If Melaleuca pays any bonuses or commissions to the Marketing Executive after the date of the violation, all bonuses and commissions for and after the calendar month in which the violation occurred shall be refunded to Melaleuca.
- (iii) Melaleuca may seek and obtain from the violating Marketing Executive both injunctive relief and damages for violations of this Policy 20. Melaleuca, may, at its option, elect to enforce this Policy by lawsuit in a court of competent jurisdiction in Idaho rather than by arbitration.
- (iv) In addition to being entitled to a refund of bonuses and commissions and to damages as described above, in the event a person or entity violates this Policy 20, Melaleuca and any Marketing Executive that experiences an adverse financial impact as a result of such person's or entity's violation of this Policy 20 shall be entitled to an accounting and repayment of all profits, compensation, commissions, remunerations or other benefits which the person or entity directly or indirectly receives and/or may receive as a result of, growing out of, or in connection with any violation of this Policy. Such remedy shall be in addition to and not in limitation of any damages, or injunctive relief or other rights or remedies to which Melaleuca is or may be entitled at law or in equity.
- (d) Violations of this Policy 20 are especially detrimental to the growth and sales of other Marketing Executives' Independent Melaleuca Businesses and to Melaleuca's business. Consequently, Marketing Executives who have

knowledge that any Marketing Executive has violated this Policy must immediately report that information to Melaleuca's Policy Administration Department. The failure of a Marketing Executive to report such information to Melaleuca will also constitute a violation of this Policy. The names of those reporting violations of this Policy will be held in confidence.

21. Proprietary Information and Trade Secrets

By executing the Independent Marketing Executive Agreement, the Marketing Executive acknowledges that all information which is contained in the Marketing Executive's Monthly Business Report, including names, addresses and telephone numbers of Marketing Executives and Customers, is Melaleuca's proprietary trade secret information. The Marketing Executive agrees not to disclose such information to any third party (except to existing or prospective Melaleuca Marketing Executives or Customers for the purpose of promoting Melaleuca products and business opportunity) or to utilize such information for the purpose of promoting any other business opportunity at any time, whether during the term of his/her association with Melaleuca or thereafter. The Marketing Executive acknowledges that such proprietary information is of such character as to render it unique and that disclosure or use thereof in violation of this provision will result in irreparable damage to Melaleuca and to Independent Melaleuca Businesses. Melaleuca and its Marketing Executives will be entitled to injunctive relief to prevent violation of this policy. If litigation or arbitration is required to obtain injunctive relief or to recover damages, the prevailing party shall be entitled to an award of attorney's fees and expenses.

22. The Enroller

- (a) A Marketing Executive who is the Enroller of a new Customer or Marketing Executive may not list another Marketing Executive who did not participate in the contact or the presentation as the Enroller of such new Customer or Marketing Executive. Regardless of where a Customer or Marketing Executive is placed in a Marketing Organization, the actual Enroller of such Customer or Marketing Executive must be listed as the Enroller on the Customer Membership Agreement.
- (b) The Enroller and any other Marketing Executives involved in the recruiting and enrollment process may use only Melaleuca's products and its compensation plan and their personal commitment to help the new Marketing Executive build his or her business as an inducement to enroll. Marketing Executives may not enter into special deals with an Enrollee, including, but not limited to, promises of the payment of money or roll ups.

23. Supervisory and Leadership Functions

Marketing Executives' compensation is based on sales of product to the End Consumer. To qualify for this compensation Marketing Executives have the ongoing responsibility to promote the Melaleuca business opportunity, to support Melaleuca's policies, programs and personnel, and to service, supervise, motivate and train the Marketing Executives in their Marketing Organization to sell and market Melaleuca products and promote the Melaleuca business opportunity. Any effort by a Marketing Executive to convince or entice any Customer or Marketing Executive to discontinue or diminish purchasing Melaleuca products, to move from one Melaleuca Marketing Organization to another, to discontinue or diminish efforts to promote the Melaleuca business opportunity, or to promote or pursue another direct selling opportunity, or to disparage Melaleuca, or its products, marketing plan, management team or other personnel is a violation of the Marketing Executive's leadership responsibility and a violation of this policy.

24. Excess Inventory Purchases Prohibited

The Melaleuca marketing program is built upon sales to the End Consumer. Products representing at least 70% of a Marketing Executive's monthly Organization Product Points must be sold to End Consumers each month. Any device or scheme whereby a Marketing Executive directly or through a third party purchases excess product solely for purposes of qualifying for bonuses or commissions constitutes fraud on the part of the Marketing Executive.

25. Selling in Stores

Melaleuca is in strong support of home-based businesses and personal product presentations. To maintain a standard of fairness, Marketing Executives may not display or sell Melaleuca products in drug stores, health food stores or grocery stores. Any display of Melaleuca products to the public must be tasteful and professional. A Marketing Executive may not display or sell Nicole Miller products in any type of retail setting.

26. Media Inquiries

It is Melaleuca's policy to have a single spokesperson handle all inquiries from the media and all media relations. Therefore, Marketing Executives may not, for any reason, discuss their Independent Melaleuca Business with the media, nor act as spokespersons for Melaleuca nor talk to the media regarding Melaleuca, its Compensation Plan, its products or services. It is a violation of this policy to provide any information to the media, regardless of whether the information is positive or negative, accurate or inaccurate. All inquiries from the media (whether radio, television or print) must be referred to Melaleuca.

27. Checks and Monthly Business Reports

Commission and bonus checks are generally mailed by Melaleuca to Marketing Executives on or about the 15th day of each month for commissions and bonuses earned during the previous month. When the 15th day of the month falls on a weekend or holiday, checks will generally be mailed on the next business day. Each Marketing Executive qualifying for a commission or bonus will receive a Monthly Business Report showing the status of each Customer and Marketing Executive in his/her Marketing Organization.

The Monthly Business Report will show the calculation of the Marketing Executive's commission and bonus in detail. Marketing Executives should use their Monthly Business Report as a tool to manage, supervise and train the members of their Marketing Organizations. The information contained in Business Reports is Melaleuca's proprietary trade secret information, and Marketing Executives are prohibited from disseminating the information contained therein. See Policy 21 for further detail regarding Marketing Executives' obligations with respect to such proprietary trade secret information. A data processing fee is charged each Marketing Executive for generating and maintaining computerized Monthly Business Reports.

Commission and bonus checks which remain uncashed for more than 180 days will not be honored and the amount of the check, less a processing fee of \$15.00^{US}/\$22.50^{CDN} and a bank cancellation/stop payment fee of \$10.00^{US}/\$15.00^{CDN}, will be credited to the Marketing Executive's account, which credit may be used towards future purchases made by the Marketing Executive. If a Marketing Executive's account is inactive and it is necessary to notify the Marketing Executive of the credit on account, a service charge of \$10.00^{US}/\$15.00^{CDN} will be deducted from the account for each notice sent.

28. Purchases for Other Persons

A Marketing Executive may not order or pay for products for Customers without such Customer's express authorization and agreement to reimburse the Marketing Executive for such product.

29. Restrictions on International Marketing (United States and Canada)

Marketing Executives enrolled in the United States and Canada are authorized to sell Melaleuca products and to enroll Customers and Marketing Executives in the United States and Canada. In all other countries in which Melaleuca or its affiliates are authorized to conduct business Marketing Executives may only enroll Customers and Marketing Executives pursuant to Melaleuca's International Sponsorship Program. Marketing Executives and Customers may not ship or sell Melaleuca products across any international border for the purpose of resale, except the U.S./Canadian border provided the products are appropriately labeled for the country of their destination. Marketing Executives and Customers may not sell, give, transfer, import, export or distribute Melaleuca products or sales aids in any country, other than the United States and Canada, nor provide products to any individual who the Marketing Executive or Customer knows or has reason to believe is exporting products to another country.

29.1. Restrictions on International Marketing (Melaleuca of the Caribbean)

Marketing Executives enrolled under Melaleuca of the Caribbean are authorized to enroll Customers and Marketing Executives in any country in which Melaleuca of the Caribbean is authorized to conduct business. In all other countries in which Melaleuca or its affiliates are authorized to conduct business, Marketing Executives may only enroll Customers and Marketing Executives pursuant to Melaleuca's International Sponsorship Program. Marketing Executives and Customers may not ship or sell Melaleuca products across any international border for the purpose of resale. Marketing Executives and Customers may not sell, give, transfer, import, export or distribute Melaleuca products or sales aids in any other country, nor provide products to any individual or entity who the Marketing Executive or Customer knows or has reason to believe is exporting products to another country.

30. Trademark, Service Mark and Trade Name Restrictions

Customers and Marketing Executives may not use, reproduce or disseminate the Melaleuca trade name or logo or any Melaleuca trademark or service mark except in the use and dissemination of literature published and made available by Melaleuca and except on stationary and business cards produced and authorized by Melaleuca. This includes, but is not limited to, the formatives "Mela" and "Mel," the term "Melaleuca," the leaf and drop logo, and all marks or slogans designating products or services offered by Melaleuca.

31. Rules regarding Advertising, Internet Usage and Sale of Materials

- (a) Marketing Executives may not:
- (i) create, publish, sell, use, display or distribute any literature, audio or video recording, Internet web site, telephone ad message, Internet bulletin board message, mass or bulk email message (including auto-response messages), infomercial or other print, audio, visual or electronic media which represents Melaleuca, its products, services, Compensation Plan or business opportunity other than as specifically permitted pursuant to this Policy and Melaleuca's Guidelines on Internet Usage or that which is produced and provided by Melaleuca;
 - (ii) copy or reproduce any materials produced by Melaleuca except as specifically permitted pursuant to this policy;
 - (iii) use the Melaleuca name or logo or the name or logo of any of Melaleuca's products or services in any notice, display, advertisement or promotion, including, but not limited to, newspaper, magazine, radio, television or Internet or email advertisements, or telephone, Internet or other directories (except a Marketing Executive may have a directory listing in the following format: "Melaleuca Independent Marketing Executive—[name of Marketing Executive]");
 - (iv) display, advertise or promote Melaleuca's products, services or business opportunity at county fairs, craft fairs, business fairs, trade shows, flea markets or any similar event, including the use of booths, without the express prior written approval of Melaleuca;
 - (v) charge for Melaleuca-related meetings performed or arranged by a Marketing Executive except to the extent necessary to cover the actual out-of-pocket expenses incurred.
- (b) Marketing Executives may use websites and email messages only in accordance with Melaleuca's Guidelines on Internet Usage as the same are published on Melaleuca's website, and which may be revised and modified from time to time at Melaleuca's sole discretion. Melaleuca will take reasonable measures to publish notice of any changes to the guidelines on its website, however it is the Marketing Executives' responsibility to review these guidelines periodically to be informed of and comply with any changes.
- (c) Marketing Executives may only use websites produced by Melaleuca's approved website vendors.
- (d) Melaleuca will have the right, in its absolute discretion, to require that any Melaleuca related website be taken down and that any Melaleuca related email message be discontinued. A Marketing Executive's failure to comply with any provision of this policy may result in forfeiture of commissions and bonuses, fines, and/or in termination of the Marketing Executive's Independent Marketing Executive Agreement.

32. Income Claims

Marketing Executives are prohibited from making false, misleading or inaccurate claims about their or other persons' compensation received under the Melaleuca Compensation Plan. If, when presenting the Melaleuca business opportunity, a Marketing Executive makes any claim regarding his/her compensation from Melaleuca, or the potential compensation payable under Melaleuca's Compensation Plan, the Marketing Executive must also show the person(s) receiving the presentation Melaleuca's current Marketing Executives Annual Income Statistics sheet.

33. Product Claims and Warranties

Marketing Executives may not make any product claims, weight loss or health benefit claims, or product warranties other than those published in Official Melaleuca Material. Marketing Executives shall not publish or distribute information relating to uses of Melaleuca products other than those which are set forth in Official Melaleuca Material. Marketing Executives may not utilize Official

Melaleuca Material which is approved for use in one country to make product claims or promote Melaleuca products in another country.

34. Ethical Sales Practices

Marketing Executives shall:

- Conduct themselves in a professional, courteous and considerate manner;
- Represent Melaleuca products in a sincere and honest manner and will honor Melaleuca's Customer Satisfaction Guarantee;
- Represent the Melaleuca Compensation Plan only as prescribed by Official Melaleuca Material;
- Become familiar with and utilize sales techniques, Melaleuca's Compensation Plan and Statement of Policies, and other materials as prescribed by Melaleuca;
- Present the Melaleuca business opportunity in a manner which is consistent with Official Melaleuca Material; and
- Provide training, motivation and support to Marketing Executives in their organization.

Marketing Executives shall not:

- Engage in any deceptive, unlawful, or unethical business or recruiting practice;
- Engage in any high pressure selling or recruiting practices;
- Enroll minors or persons who are not capable of making an informed decision with respect to entering into a Customer Membership Agreement or Independent Marketing Executive Agreement;
- Order Melaleuca products for other Customers or Marketing Executives without the express permission of such persons; or
- Seek in any way to violate or circumvent Melaleuca's policies.

35. Policy Disclosure Requirement

Prior to enrolling a prospective Marketing Executive, Marketing Executives shall provide to and review with the prospective Marketing Executive a current copy of Melaleuca's Statement of Policies and Definitions of Terms.

36. Voluntary Resignation Due to Inactivity

It is the Marketing Executive's responsibility to lead his/her Marketing Organization with the proper example in production of Personal Product Points. Without this proper example and leadership, the Marketing Executive will lose his/her right to receive commissions and bonuses from his/her Marketing Organization. Therefore, Marketing Executives who produce less than the minimum Personal Product Points required to maintain their current Active Status during a month, as set forth in the Compensation Plan, will not receive the commission or bonus attributable to such status for the sales generated through their Marketing Organization for that month. Failure to meet Personal Product Point requirements for two consecutive months constitutes the Marketing Executive's voluntary resignation. A Marketing Executive who has voluntarily resigned will lose all his/her Personal Enrollees and his/her Marketing Organization. The resignation shall become effective on the day following the last day of the second month of inactivity.

37. Reactivation and Reenrollment Requirements

- (a) When a Marketing Executive who has been deemed to have voluntarily resigned due to inactivity under Policy 36 becomes reactivated, he/she will reenter his/her previous Marketing Organization in the first available position below his/her original Marketing Executive other than the position left vacant by such Marketing Executive.
- (b) Former
- (i) Customers and Marketing Executives with the Executive Status of Marketing Executive III or below
 - (1) may re-enroll as new Customers and Marketing Executives with their original Enroller and their original Marketing Executive at any time, but each such reenrollment will constitute a new enrollment for the Enroller only if the newly reenrolled Customer has been canceled or inactive for 12 consecutive months or longer prior to reenrolling.
 - (2) who have not been enrolled with Melaleuca for at least the previous six consecutive months may reenroll as new Customers and Marketing Executives with the Enroller and Marketing Executive of their choice.
 - (ii) Marketing Executives with the Executive Status of Director and above
 - (1) may reenroll as new Customers and Marketing Executives with their original Enroller and their original Marketing Executive at any time, but each such reenrollment will constitute a new enrollment for the

- Enroller only if the newly reenrolled Customer has been cancelled or inactive for 12 consecutive months or longer prior to reenrolling.
- (2) who have not been enrolled with Melaleuca for at least the previous two years may reenroll as new Customers and Marketing Executives with the Enroller and Marketing Executive of their choice.
 - (c) If a former Customer or Marketing Executive desires to reenroll in a new Marketing Organization in which any Marketing Executive in the new Support Team was also in his/her previous Support Team, such former Customer or Marketing Executive may reenroll no sooner than twelve months following the date that such Support Team Marketing Executive became inactive in his/her previous Marketing Organization. Any individual involved in the violation of this policy will be subject to corrective measures pursuant to Policy 42, including fines and/or cancellation of his or her Independent Marketing Executive Agreement.
 - (d) Former Customers or Marketing Executives who reenroll pursuant to this Policy 37 will not be eligible to roll up pursuant to Policy 39.

38. Titles Not Forfeited

A Marketing Executive can lose his/her Marketing Executive II, Marketing Executive III, Director, Senior Director, Executive Director or Corporate Director status and therefore the right to participate in the corresponding commission and bonus if he/she no longer qualifies for the commission or bonus pertaining to such status. However, as long as a Marketing Executive remains active, he/she will not forfeit the title of the highest status he/she has achieved, i.e., once a Director, always a Director, once an Executive Director, always an Executive Director.

39. Roll Up Policy

- (a) When a vacancy occurs in a Marketing Organization due to the inactivity, voluntary resignation or involuntary termination of a Marketing Executive (a "Canceled Marketing Executive"), each Marketing Executive in the first generation below the Canceled Marketing Executive (a "First Generation Marketing Executive") will have the opportunity to qualify to roll up into the position of the Canceled Marketing Executive. In order to qualify for such roll up, the following requirements must be met:
 - (i) If the Canceled Marketing Executive's Organization Product Points were less than 2,500 in the Canceled Marketing Executive's first month of inactivity, the First Generation Marketing Executive with the highest Active Status in the Canceled Marketing Executive's second month of inactivity will roll up to the position of the Canceled Marketing Executive in the month following the Canceled Marketing Executive's second month of inactivity. In the event of a tie, the following criteria will be applied, in the order listed, to the First Generation Marketing Executives involved in the tie until the tie is broken:
 - (1) who has the largest number of personally enrolled Directors;
 - (2) who has the largest number of personally enrolled Preferred Customers;
 - (3) whose Marketing Organization has the largest number of Preferred Customers;
 - (4) whose Marketing Organization has the highest average Product Point order per Customer; and
 - (5) who has the highest Personal Product Points.
 - (ii) If the Canceled Marketing Executive's Organization Product Points were equal to or greater than 2,500 in the Canceled Marketing Executive's first month of inactivity, the First Generation Marketing Executive who has or first attains the status which corresponds to the Canceled Marketing Executive's Organization Product Points in the first month of inactivity will roll up to the position of the Canceled Marketing Executive the month following the month the First Generation Marketing Executive has or attains such status, but in no event sooner than the month following the Canceled Marketing Executive's second month of inactivity. If two or more First Generation Marketing Executives qualify for the roll up in the same month, the tie will be broken by application of the criteria set forth in subparagraph (i) above.
- (b) The Enroller of a Canceled Marketing Executive will inherit the Canceled Marketing Executive's Personal Enrollees as follows:
 - (i) For each Personal Enrollee that is a Customer (with no Marketing Organization) or that had the Active Status of a Marketing Executive

and had less than 2,500 Organization Product Points in the Canceled Marketing Executive's first month of inactivity the Enroller will automatically inherit the Personal Enrollee in the Canceled Marketing Executive's third month of inactivity.

- (ii) For each Personal Enrollee that had the Active Status of a Marketing Executive II or above and had less than 2,500 Organization Product Points in the Canceled Marketing Executive's first month of inactivity, the Enroller will inherit such Personal Enrollee in the month following the month the Personal Enrollee has advanced one status above the active status the Personal Enrollee had in the Canceled Marketing Executive's first month of inactivity.
- (iii) For each Personal Enrollee that had Organization Product Points of 2,500 or more in the Canceled Marketing Executive's first month of inactivity, the Enroller will inherit such Personal Enrollee in the month following the month the Personal Enrollee has advanced one status level above the Volume Status that the Personal Enrollee had in the Canceled Marketing Executive's first month of inactivity.
- (iv) If the Personal Enrollee had Organization Product Points of 50,000 or more or an Executive Status of Executive Director or higher in the Canceled Marketing Executive's first month of inactivity, the Enroller cannot inherit such Personal Enrollee.
- (v) No Enroller can inherit a Personal Enrollee whose Executive Status is higher than his/her own, unless neither has an Executive Status higher than Director II.
- (c) If the Canceled Marketing Executive had the Active Status of Senior Director or above in his/her last month of activity and (i) was terminated by Melaleuca for a policy violation or (ii) voluntarily resigned or went inactive while under investigation for a policy violation, the Enroller of such Canceled Marketing Executive will continue to receive credit for having a Personal Enrollee with the same status (Senior, Executive or Corporate Director) to count towards the Enroller's status for twelve consecutive months from the month following the termination or resignation of the Canceled Marketing Executive. For each month after the initial twelve months, the Enroller of such Canceled Marketing Executive will receive credit for having a Personal Enrollee with the status (Senior, Executive or Corporate Director) attributable pursuant to the Compensation Plan to the Group Volume of the Marketing Organization of the Canceled Marketing Executive. However, such credit cannot apply at the same time with respect to two Personal Enrollees. Therefore, the credit will expire in the first month in which both of the following have occurred: (x) a Personal Enrollee of the Canceled Marketing Executive rolls up into the position previously held by the Canceled Marketing Executive, and (y) the Enroller of the Canceled Marketing Executive inherits or has inherited such Personal Enrollee of the Canceled Marketing Executive.
- (d) To qualify for any roll up or inheritance, the Marketing Executive who will be receiving the roll up or who will be inheriting Personal Enrollees must have been in compliance with Melaleuca's policies for the preceding 12 months.

40. Obligations of Independent Contractors

As an independent contractor, it is a Marketing Executive's responsibility to:

- (a) Abide by any and all federal, state, provincial, county and local laws, rules and regulations pertaining to the acquisition, receipt, holding, selling, distributing or advertising of Melaleuca products and services and the promotion of the Melaleuca business opportunity;
- (b) At the Marketing Executive's own expense, make, execute or file all such reports and obtain such licenses as are required by law or public authority with respect to his/her Independent Melaleuca Business and/or the receipt, holding, selling, distributing or promoting of Melaleuca products;
- (c) Be solely responsible for declaration and payment of all local, state, provincial, federal and general sales taxes and fees as may accrue because of the Marketing Executive's activities in conjunction with his/her Independent Melaleuca Business;
- (d) Supply all of his/her own equipment and tools for operating his/her business, such as telephone, transportation, professional services, office equipment, and office supplies; and
- (e) Provide his/her own place of business and determine his/her own work hours.

41. Marketing Executives Are Not Corporate Representatives

Marketing Executives are not corporate representatives of Melaleuca and are not authorized to incur any debt, expense or obligation on behalf of or for Melaleuca, nor bind Melaleuca to any agreement or contract.

42. Corrective Measures

All of the policies in this Statement of Policies, the provisions of the Independent Marketing Executive Agreement, the Corporate Entity Application and Agreement, the Tax Exempt Entity Application and Agreement and any other agreements entered into by and between Melaleuca and Marketing Executives are material terms to the agreement between Melaleuca and Marketing Executives. A Marketing Executive's violation of any of the terms and conditions of any of these agreements or the Statement of Policies or any illegal, fraudulent, deceptive or unethical business conduct by a Marketing Executive may result, at Melaleuca's discretion, in one or more of the following corrective measures:

- (a) issuance of a written warning or admonition;
- (b) imposition of a fine, which may be imposed immediately or withheld from future commission and/or bonus checks;
- (c) reassignment of all or part of his/her Marketing Organization;
- (d) suspension of his/her Independent Marketing Executive Agreement for one or more months;
- (e) cancellation of his or her Independent Marketing Executive Agreement; or
- (f) any other measure expressly stated within any of the policies set forth in the Statement of Policies or any provision of the Marketing Executive Agreement, the Corporate Entity Application and Agreement, or the Tax Exempt Entity Application and Agreement.

Melaleuca has the right to withhold from a Marketing Executive all bonuses and commissions during the period that Melaleuca is investigating the alleged violative conduct of the Marketing Executive. If a Marketing Executive's Independent Marketing Executive Agreement is canceled due to a violation preceding the investigation, the Marketing Executive will not be entitled to any commissions or bonuses withheld by Melaleuca during the investigation period.

43. Forfeiture of Rights to Bonuses and Commissions

So long as a Marketing Executive is complying with all policies and terms of the Independent Marketing Executive Agreement, Melaleuca is obligated to pay commissions and bonuses to such Marketing Executive in accordance with the Compensation Plan. A Marketing Executive's commissions and bonuses constitute the entire consideration for all of the Marketing Executive's efforts in generating sales, and the Marketing Executive's right to receive commissions and bonuses from Melaleuca constitutes the entire value attributable to the Marketing Executive's Marketing Organization. Following a Marketing Executive's resignation, cancellation for inactivity, or voluntary or involuntary cancellation of his/her Independent Marketing Executive Agreement, such former Marketing Executive shall have no right, title, claim or interest to the Marketing Organization. The former Marketing Executive shall have no claim for compensation for the Marketing Organization or for bonuses or commissions stemming from sales generated within or by the Marketing Organization or for car bonus amounts held in escrow by Melaleuca. Following voluntary or involuntary cancellation of his/her Independent Marketing Executive Agreement, the former Marketing Executive shall not hold himself/herself out as a Melaleuca Marketing Executive and shall not have the right to sell Melaleuca products or services.

44. Amendments to Compensation Plan, Statement of Policies, and/or Independent Marketing Executive Agreement

Upon notification to Marketing Executives, Melaleuca may, at its sole discretion, amend the Compensation Plan, Statement of Policies, Definitions of Terms and/or the terms of the Independent Marketing Executive Agreement and any other agreements entered into by and between Melaleuca and the Marketing Executives. By signing the Independent Marketing Executive Agreement, Marketing Executives agree to abide by any such amendments. The continuation of an Independent Melaleuca Business or a Marketing Executive's acceptance of commissions and/or bonuses from Melaleuca constitutes his/her acceptance of any such amendments. Marketing Executives will be bound by the most current versions of the Compensation Plan, the Statement of Policies, the Definitions of Terms, the Independent Marketing Executive Agreement and any other agreements entered into by and between Melaleuca and the Marketing Executives.

MELALEUCA DEFINITIONS OF TERMS

The following terms will have the meanings set forth herein when used in Melaleuca's Statement of Policies, Compensation Plan and/or Independent Marketing Executive Agreement and other Official Melaleuca Material.

Active Customer: Any Customer who purchases at least 35 Product Points each month.

Active Marketing Executive: A Marketing Executive who personally produces the number of Product Points each month that are required to qualify at his/her Active Status level pursuant to the Compensation Plan.

Active Status: The development position or leadership status of a Marketing Executive as of the most recent month end, or business reporting period.

Annual Income Statistics: A summary of income statistics published by Melaleuca setting forth information regarding average, high and low income received by Marketing Executives on an annual basis.

Assist: A Marketing Executive who helps another Marketing Executive to present the Melaleuca program may be designated as the "Assist" on the Independent Marketing Executive Agreement form. The Marketing Executive designated as the "Assist" receives the Value Pack and Career Pack commission on the first Value Pack or Career Pack ordered by the new Customer or Marketing Executive.

Average Retention Index: An average of the percentages of customers remaining in an organization from the past 5 enrollment months. Your ARI is used to determine your Retention Factor, multiplier in the Leadership Pool Formula, and (if you are a Senior Director or above) determines your participation in the Leadership Growth Bonus.

Backup Order: A preselected package of Melaleuca products which is automatically shipped to Preferred Customers if they fail to order the minimum monthly Product Points agreed upon in their Customer Membership Agreement. Those who select the Preferred Customer option in the Customer Membership Agreement preauthorize Melaleuca to send a Backup Order and to make an automatic withdrawal from their checking account, or a charge to their credit card to pay for each Backup Order.

Business Kit (Membership Kit): The Melaleuca product and business opportunity information portfolio purchased by a new Marketing Executive pursuant to the terms of the Independent Marketing Executive Agreement which includes product and marketing information and other Official Melaleuca Material.

Compensation Plan: The plan offered by Melaleuca which sets forth the compensation provided to Marketing Executives for the continuing building, promoting, training, motivation, servicing and development of their Independent Melaleuca Businesses.

Corporate Entity Application and Agreement: The addendum to the Independent Marketing Executive Agreement which must be completed by corporate entities which are applying to become Marketing Executives.

Customer: A person who has an Enroller, has completed, executed and delivered to Melaleuca a Customer Membership Agreement and has paid to Melaleuca the appropriate membership fee. Customers are either Direct Customers or Preferred Customers.

Customer Membership Agreement: The agreement which must be completed, signed, received and accepted by Melaleuca before a person may become a Customer.

Customer Number: A unique number assigned by Melaleuca to each Customer to facilitate internal record keeping by Melaleuca with respect to the Customer.

Direct Customer: A Customer who is authorized to purchase product from Melaleuca at Direct Customer prices pursuant to a Customer Membership Agreement.

Electronic Checking: A payment method by which a Customer authorizes Melaleuca to deduct payment for orders directly from his/her checking account (not yet permitted in Jamaica or Bahamas).

End Consumer: A person who purchases Melaleuca products for the purpose of consuming them rather than for resale to someone else.

Enroll: To enlist, sponsor or sign up an individual or entity into a program or organization.

Enrollee: A Customer or Marketing Executive.

Enroller: The Marketing Executive who is listed on the Customer Membership Agreement as the enroller. The Enroller must be the person who introduced the new Customer to Melaleuca and helped him/her become a Customer or who played an active role in the presentation of Melaleuca products or business opportunity to the new Customer.

Executive Status: The highest leadership position ever achieved with Melaleuca.

ExpressLink: A faster, simpler way to shop online.

Immediate Household: Married couples and persons residing in the same home, and with respect to Marketing Executives and Customers which are entities (e.g., corporations, tax exempt entities, trusts, etc.) rather than individuals. Immediate Household means the shareholders, owners, directors, officers, trustees, responsible parties, etc. of such entities and persons married to or residing in the same home with the persons who are the shareholders, owners, directors, officers, trustees, responsible parties, etc. of such entities.

Inactive Customer: A Customer becomes inactive if he/she fails to purchase a minimum of 35 Product Points for two consecutive months.

Inactive Marketing Executive: A Marketing Executive becomes inactive if he/she fails to personally produce the number of Product Points that are required to qualify at his/her Active Status level pursuant to the Compensation Plan for two consecutive months.

Independent Marketing Executive Agreement: The agreement which must be completed, signed, received and accepted by Melaleuca as one of the prerequisites to becoming a Marketing Executive.

Independent Melaleuca Business: The business organization consisting of a Marketing Executive and those persons and entities that purchase Melaleuca products or generate sales of Melaleuca products from which the Marketing Executive is entitled to receive commissions.

Marketing Executive: A person who has an Enroller, has completed, executed and delivered to Melaleuca an Independent Marketing Executive Agreement, has purchased a Business Kit, has at least one Customer and has received his/her first commission check.

Marketing Organization: The Customers and Marketing Executives that comprise the group of individuals or entities from which the Marketing Executive is entitled to receive commissions based upon the collective sales volume of the group and the status of certain Marketing Executives within the group pursuant to the Plan of Compensation.

MelaCom™: Melaleuca's long-distance telephone service as marketed by Melaleuca, regardless of the interexchange carrier for such service.

Melaleuca: Melaleuca, Inc., Melaleuca of Canada, Inc., and/or Melaleuca of the Caribbean, Inc.

Melaleuca International Sponsorship Program: The program offered by Melaleuca with regard to sponsorship by Marketing Executives in one country of Customers and Marketing Executives in foreign countries where Melaleuca is authorized to do business.

Monthly Business Reports: Reports produced by Melaleuca on a monthly basis and provided to Marketing Executives which contain information relating to the activity of the Marketing Executive's Marketing Organization. The Monthly Business Reports contain trade secret information that is proprietary to Melaleuca.

Official Melaleuca Material: Material in any form which is authorized, published, and disseminated by Melaleuca. This includes, but is not limited to, printed material, audio and video tapes, satellite broadcasts, fax and electronic

communications and Internet communications.

Organization Product Points: The total Product Points attributable to Melaleuca products which a Marketing Executive's Marketing Organization purchased or produced in a calendar month, including the Marketing Executive's Personal Product Points. For each month that a Marketing Executive is enrolled in and is using the MelaCom™ program, his or her Organization Product Points for that month will include Product Points attributable to MelaCom usage by the Marketing Executive's Marketing Organization in that calendar month. For each month that a Marketing Executive has an active Melaleuca Credit Card, his or her Organization Product Points for that month will include Product Points attributable to Melaleuca Credit Card usage by the Marketing Executive's Marketing Organization in that calendar month.

Organization PCs: The total net Preferred Customers in a Marketing Executive's organization in a given month.

PEG Volume: Personal Enrollee Group (PEG) Volume is the total organization Product Point volume of a Marketing Executive's Personal Enrollees in any given month.

Personal Product Points: The total monthly Product Points personally produced by a Marketing Executive.

Personal Customer: A person who purchases product directly from Melaleuca using a Marketing Executive's account number.

Personal Enrollee: An Enroller's Enrollee to whom the Enroller has personally introduced Melaleuca and/or has played an active role in the presentation of Melaleuca products or business opportunity.

Personal Director: A Personal Enrollee with the active status of Director or above.

Personal Sales: Sales which a Marketing Executive makes to a Personal Customer.

Preferred Customer: A Customer who is authorized to purchase products from Melaleuca at Preferred Customer prices and who has committed to purchase each month products totaling at least 35 Product Points.

Product Points: A value assigned to each Melaleuca product or service upon which commissions and bonuses are calculated.

Product Point Production: To produce Product Points a Marketing Executive must create sales to end consumers other than customers in the Marketing Executive's Marketing Organization. These sales must be products the consumer actually desires or needs as opposed to enticing consumers to purchase products in order for the Marketing Executive to qualify for a commission.

Recruit: 1) To attempt to enroll, enlist, or solicit an individual or entity to join a business, program or organization; or 2) to attempt to promote, influence or encourage an individual or entity to join a business, program or organization; or 3) to present, or participate or assist in the presentation of, a business, program, organization or its products. To constitute recruiting, such efforts or attempts may be performed either directly through personal contact or indirectly through a third party.

Statement of Policies: The policies published by Melaleuca, as amended from time to time, which set forth, among other things, the requirements for operating an Independent Melaleuca Business.

Support Team: The Marketing Executives above an individual in a Marketing Organization who have the potential to receive commissions based upon the purchases of such individual.

Tax Exempt Entity Application and Agreement: The addendum to the Independent Marketing Executive Agreement which must be completed by tax exempt entities which are applying to become Marketing Executives.

VFL.com: Melaleuca's vitality website to help track fitness and wellness goals.

Volume Status: All advancements in status of Director II or above require a minimum volume of Organization Product Points. The status corresponding to each required volume in the compensation plan is the Volume Status.

EXHIBIT C

1 financial officer, I do not have knowledge of that.

2 Q. And so the record's clear, that
3 question was not the best articulated, and I
4 apologize. But I'm wanting to focus on the alleged
5 conduct of my clients, and just so that we're
6 clear, you don't have any evidence of any marketing
7 executives that have this disheartened feeling or
8 feeling of instability that relates to alleged
9 conduct of my clients under policy 20?

10 A. None that I'm aware of at this time.

11 Q. Well, then let me turn it back and ask
12 you just point blank, what evidence do you have
13 specifically that Melaleuca has been irreparably
14 harmed by my client's alleged conduct under policy
15 20?

16 A. Well, as I said, this is very -- it's
17 a special relationship that we have with our
18 marketing executives and one where trust and
19 confidence is very important. Very hard to measure
20 or for me to place a value or project what those
21 damages are. Therefore, we're going to engage a
22 special consultant to help or assist us in putting
23 a value or a damage assignment.

24 Q. Fair enough. Putting aside a dollar
25 value, I'm talking about specifically not damages,

EXHIBIT D

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Richard J. Armstrong ISBN 5548
500 Eagle Gate Tower
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Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
rjarmstrong@woodjenkinslaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	DEFENDANTS' THIRD SET OF
	)	INTERROGATORIES AND FOURTH
vs.	)	REQUESTS FOR PRODUCTION
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	The Honorable Jon J. Shindurling
Defendants.)	
)	
)	
)	

Pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following Third Set of Interrogatories and Fourth Requests for Production to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Jenkins LLC, 500 Eagle Gate Tower, 60 East South Temple Salt Lake City, Utah 84111.

THIRD SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the specific dollar amount of damages you claim were caused by Defendants' alleged violations of Policy 20.

INTERROGATORY NO. 2: State the name, address, and telephone number of any experts you have designated or intend to designate to testify on Melaleuca's behalf regarding any damages in any currently pending litigation or arbitration where at least one of the claims involves allegations of Policy 20 violations and/or unlawful recruiting of Melaleuca's marketing executives.

INTERROGATORY NO. 3: In relation to any currently pending litigation or arbitration, state the name of the case, case number, and court where you have designated or intend to designate an expert witness to testify on your behalf relating to the issue of damages arising from alleged violations of Policy 20 and/or unlawful recruiting of Melaleuca's marketing executives.

INTERROGATORY NO. 4: In relation to this case, state the name, address, and telephone number of each expert witness you intend to designate pursuant to Idaho R. Civ. P. 26(b)(4).

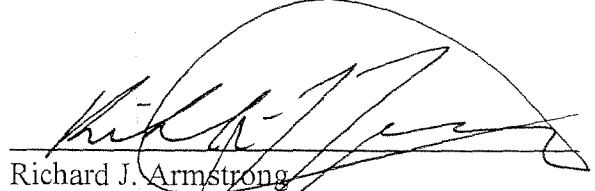
FOURTH REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1: Please produce all expert reports that have been prepared in relation to the experts and/or matters identified in Interrogatory Nos. 2-4 above.

REQUEST NO. 2: Please produce any and all correspondence, including e-mails and other correspondence, between Melaleuca on one hand and the expert(s) identified in Interrogatory No. 4 above on the other.

DATED this 25th day of January, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Attorneys for Defendants

S:\WPDATA\PLEADING\FOELLER.MELALEUCA.THIRD SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION.wpd

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
	)	<i>CERTIFICATE OF SERVICE OF</i>
Plaintiff,	)	<i>DEFENDANTS' THIRD SET OF</i>
	)	<i>INTERROGATORIES AND FOURTH</i>
vs.	)	<i>REQUESTS FOR PRODUCTION</i>
)	
	)	Civil No. CV-09-2616
RICK FOELLER and NATALIE)	
FOELLER,	)	The Honorable Jon J. Shindurling
)	
Defendants.)	
)	
)	
)	

I HEREBY CERTIFY that on the 25th day of January, 2011, a true and correct
copy of ***DEFENDANTS' THIRD SET OF INTERROGATORIES AND FOURTH***
REQUESTS FOR PRODUCTION were mailed to the following:

Curt R. Thomsen
Richard Friess
THOMSEN STEPHENS LAW OFFICES, P.L.L.C.
2635 Channing Way
Idaho Falls, Idaho 83404
Attorneys for Plaintiff

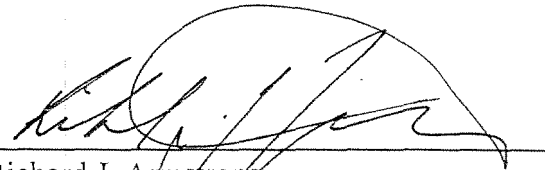
Brent V. Manning
Manning Curtis Bradshaw & Bednar LLC
170 South Main Street, Suite 900
Salt Lake City, Utah 84101
Attorneys for Plaintiff

Josh Chandler, Esq.
Ryan Nelson, Esq.
3910 S. Yellowstone Hwy.
Idaho Falls, ID 83402
Attorneys for Plaintiff

DATED this 25th day of January, 2011.

WOOD JENKINS LLC

By



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riarmstrong@woodjenkinslaw.com
Attorneys for Defendants

EXHIBIT E

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Josh Chandler, Esq., ISB # 7756
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Idaho Falls, ID 83402
Telephone (208) 522-0700
Fax (208) 534-2063/522-1277

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
RICK AND NATALIE FOELLER,)
individuals,)
)
Defendants.)
_____)

Case No. CV-09-2616

PLAINTIFF'S ANSWERS TO
DEFENDANTS' THIRD SET OF
INTERROGATORIES AND FOURTH
REQUESTS FOR PRODUCTION

Plaintiff Melaleuca, Inc. answers the Defendants' Third Set of Interrogatories and Fourth Requests for Production as follows:

GENERAL OBJECTIONS

1. Plaintiff generally objects to the Requests to the extent that they demand that Plaintiff respond in a manner inconsistent with the requirements of the Idaho Rules of Civil Procedure.
2. Plaintiff generally objects to Defendants's "Instructions" and "Definitions" to the extent they are in any way inconsistent with the requirements of the Idaho Rules of Civil Procedure.
3. Plaintiff generally objects to the Requests to the extent that they seek to compel disclosure of confidential and/or privileged information under the attorney/client privilege, information which is non-discoverable under the attorney work product doctrine, i.e., information prepared in anticipated of litigation or this proceeding, or containing the mental impressions, conclusions, opinions or legal theories of any attorney or other legal or investigative representative of Plaintiff, or other applicable privileges, laws or doctrines which prohibit or otherwise limit discovery, or information which has been gathered or prepared in anticipation of or in connection with litigation. To the extent that the Requests can be construed to seek such information, Plaintiff objects to those requests and will provide only non-privileged and non-immune information.
4. Plaintiff generally objects to the Requests to the extent that they seek to compel the production or disclosure of information not relevant to the subject matter involved in this action and not reasonably calculated to lead to the discovery of relevant and/or admissible evidence. By providing any of the information requested, Plaintiff does not concede the relevance thereof to the subject matter of this litigation.
5. Plaintiff generally objects to the Requests to the extent that they are indefinite, vague,

ambiguous, overly broad or duplicative.

6. Plaintiff objects to the Requests to the extent they are unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy and the issues at stake in the litigation. Plaintiff is willing, however, to confer with Defendants to resolve any disagreements between the parties relating to the scope, breadth and relevance of Defendants' discovery requests.

7. Plaintiff objects to the Requests to the extent they seek information already known to Defendants or available to Defendants from documents in their own files or from public sources.

8. Plaintiff objects to the Requests to the extent they call for a legal conclusion. Plaintiff's responses shall not be construed as providing a legal conclusion concerning the meaning or application of any term(s) or phrase(s) used in the Requests.

9. Plaintiff objects to the Requests to the extent they seek information that is not within the possession, custody or control of Plaintiff.

10. Any response to the Requests indicating that documents have been or will be produced is not to be construed as an admission that documents responsive to the specific Request actually exist.

Plaintiff incorporates each of the foregoing objections into its response to each individual request as though fully set forth therein.

THIRD SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the specific dollar amount of damages you claim were caused by Defendants' alleged violations of Policy 20.

ANSWER: Plaintiff is in the process of determining the amount of damages caused by Defendants' alleged violations of Policy 20 and will seasonably supplement this answer when the

determination is made.

INTERROGATORY NO. 2: State the name, address, and telephone number of any experts you have designated or intend to designate to testify on Melaleuca's behalf regarding any damages in any currently pending litigation or arbitration where at least one of the claims involves allegations of Policy 20 violations and/or unlawful recruiting of Melaleuca's marketing executives.

ANSWER: Plaintiff objects to this interrogatory. To the extent the interrogatory seeks information regarding experts Plaintiff has retained or intends to retain in actions separate from the present one, the information sought is irrelevant and is also protected under I.R.C.P. 26(b)(4) and 26(b)(4)(B).

INTERROGATORY NO. 3: In relation to any currently pending litigation or arbitration, state the name of the case, case number, and court where you have designated or intend to designate an expert witness to testify on your behalf relating to the issues of damages arising from alleged violations of Policy 20 and/or unlawful recruiting of Melaleuca's marketing executives.

ANSWER: Plaintiff objects to this interrogatory. To the extent the interrogatory seeks information regarding experts Plaintiff has retained or intends to retain in actions separate from the present one, the information sought is irrelevant and is also protected under I.R.C.P. 26(b)(4) and 26(b)(4)(B).

INTERROGATORY NO. 4: In relation to this case, state the name, address, and telephone number of each expert witness you intend to designate pursuant to Idaho R. Civ. P. 26(b)(4).

ANSWER: Plaintiff will provide this information in accordance with the expert witness disclosure cutoff date set forth in the Court's January 25, 2011 Scheduling Order.

FOURTH REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1: Please produce all expert reports that have been prepared in relation to

4 - ANSWERS TO DEFENDANTS' THIRD SET OF INTERROGATORIES AND FOURTH REQUESTS FOR PRODUCTION

the experts and/or matters identified in Interrogatory Nos. 2-4 above.

RESPONSE: With respect to Interrogatories Nos. 2-3, see Plaintiff's Answers to the respective interrogatories. With respect to Interrogatory No. 4, Plaintiff will provide this information in accordance with the expert witness disclosure cutoff date in the Court's January 25, 2011 Scheduling Order.

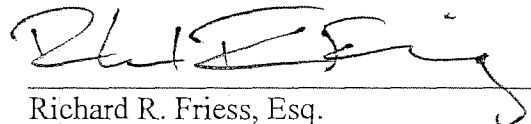
REQUEST NO. 2: Please produce any and all correspondence, including e-mails and other correspondence, between Melaleuca on one hand and the expert(s) identified in Interrogatory No. 4 above on the other.

RESPONSE: Plaintiff objects on the basis that the Request seeks information outside I.R.C.P. 26(b)(1) and on the basis that the information sought is subject to the attorney client and/or work product privilege. Without waiving said objection, see Answer to Interrogatory No. 4.

DATED this 22 day of February, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Richard R. Friess, Esq.

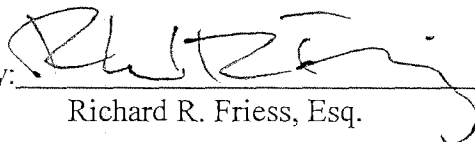
CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 22 day of February, 2011, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

RICHARD J. ARMSTRONG, ESQ
500 EAGLE GATE TOWER
SALT LAKE CITY, UT 84111
FAX: (801) 366-6061

☒ Mail
☐ Hand Delivery
☐ Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By: 
Richard R. Friess, Esq.

CRT:RRF:skp
4550-021\028 ANS 3RD INT & 4TH REQ.wpd

EXHIBIT F

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
Plaintiff,)
v.)
RICK FOELLER and NATALIE FOELLER,)
Defendants.)
_____)

Case No. CV-09-2616

PLAINTIFF'S EXPERT
WITNESS DISCLOSURE

In accordance with the court's Order Setting Pre-Trial Conference and Jury Trial dated January 25, 2011, Plaintiff Melaleuca, Inc., hereby makes the following expert witness disclosure:

1. Robert W. Smith, CPA/ABV - 36 South State Street, Suite 500, Salt Lake City, UT 84111; (801) 708-7700.

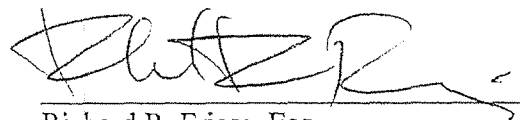
Mr. Smith is a shareholder of Lone Peak Valuation Group. Prior to Lone Peak he was a Director in the international professional services firm of LECG. He has approximately fifteen years of public accounting/consulting experience. Throughout his employment he has spent a considerable amount of time calculating commercial litigation damages and intellectual property damages. He also performs valuations of businesses and various intellectual property assets outside the context of litigation. A complete copy of his curriculum vitae is attached as Exhibit "A."

Mr. Smith will offer an expert opinion as to the damages Melaleuca suffered as a result of Foeller's recruitment of Melaleuca Marketing Executives to Max International.

DATED this 20 day of September, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Richard R. Friess, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on September 20, 2011, I caused a true and correct copy of the foregoing **PLAINTIFF'S EXPERT WITNESS DISCLOSURE** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

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☐ Facsimile
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THOMSEN STEPHENS LAW OFFICES, PLLC

By:

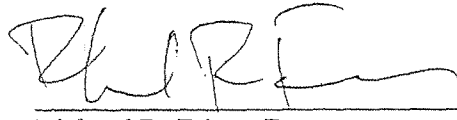

Richard R. Friess, Esq.

EXHIBIT A

LONEPEAK

VALUATION GROUP

ROGER W. SMITH, CPA/ABV

36 South State Street, Suite 500
Salt Lake City, UT 84111
Main: (801) 708-7700
Fax: (801) 708-7701
Direct: (801) 321-6330
E-mail: rsmith@lonepeakvaluation.com

Professional Emphasis

Principal of the Lone Peak Valuation Group specializing in the valuation of closely-held businesses and intangible assets for the purposes of acquisitions, sales, purchases, incentive stock options and litigation/dispute support (lost profit claims, intellectual property infringement claims, shareholder disputes). Also performs various accounting/transaction review and analyses.

Professional Experience

2008 to present	Lone Peak Valuation Group <i>Principal</i> Salt Lake City, Utah Financial Advisory Services
2001 to 2008	LECG <i>Director</i> Salt Lake City, Utah Financial Advisory Services
1995 to 2001	PricewaterhouseCoopers, LLP <i>Manager</i> Salt Lake City, Utah

Professional Credentials

Certified Public Accountant- Accredited in Business Valuation

Education

University of Utah
Salt Lake City, Utah
Masters of Accounting- Awarded Outstanding Accounting Scholar
BS Accounting- Magna Cum Laude, Phi Beta Kappa

Professional Memberships/Involvement

American Institute of Certified Public Accountants
Utah Association of Certified Public Accountants- Chairman of the Business Valuation Committee
(2001 - 2002, 2002 - 2003)
Co-Instructor NACVA- Valuing Intellectual Property
Instructor NACVA- Valuing Intellectual Property for Financial Reporting Purposes

Speeches, Articles, and Books

"Calculating IP Damages"

NACVA, Washington DC–Nov 2001

"Fair Value and Its Implications for All of Us"

The Journal Entry–December 2002

"An Introduction to Valuing Intellectual Property"

The RMA Journal – May 2002

"Valuation and SFAS 141 & 142"

The Journal Entry–June 2002

"Valuing Intellectual Property"

Western States Association of Tax Administrators- 2002

"Business Valuation Basics"

UACPA Business Valuation Symposium

–September 2002

"Intellectual Property Damages: Guidelines and Analysis,"

Contributing Author, Wiley Publications, November 2002

"Business Valuation"

University of Utah- May 2004

"Valuing IP for Purchase Price Allocations"

NACVA, Salt Lake City- Oct 2005

"How to Determine the Value of Your Business"

Law School for Business People, Small Business Development Group- October 2006

"Intangible Asset Valuation"

ACG Corporate Roundtable, March 2007

"Fair Value Issues in Financial Reporting"

UACPA Winter Symposium, December 2010

Roger W. Smith- Prior Testimony Experience:

Case Name	Description
Utah Resources International, Inc. v. Mark Technologies Corp., et al.	Deposition, State Court, Utah
Traverse Mountain Enterprises, LLC v. VS Fox Ridge, LLC., et. al.	Deposition, State Court, Utah
Horton et. al. v. Park City Group, Inc., et. al.	Deposition, State Court, Utah
Mitchell v. Freeman & Jones	Deposition, Arbitration State Court, Nevada
Wasatch Oil & Gas, LLC v. Reott et. al.	Trial, State Court, Utah
Kortright et. al. v. Advanced Network Installations, LLC, et. al.	Deposition, Trial State Court, Utah
CRND LLC v. Seelevel et. Al	Deposition, State Court, Utah
Daly v. Lambert	Deposition
Techni-Graphic Services, Inc., v. Majestic Homes	Trial Deposition Federal Court, Utah
Darol Forsythe, John Forsythe, and PIN/NIP, Inc. v. Tri-River Chemical Company, Inc., and Aceto Agricultural Chemicals Corporation	Deposition Federal Court, Idaho
Bonneville Distributing, Inc., v. Green River Development Associates, Inc., et al.	Trial Deposition State Court, Utah
Oliekan v. Oliekan	Trial State Court, Utah

EXHIBIT G

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, Inc.,

Plaintiff,

-vs.-

RICK FOELLER, et al,

Defendants.

Case No. CV-2009-2616

**ORDER SETTING PRE-TRIAL
CONFERENCE AND JURY TRIAL**

11 JAN 25 09:41

7TH JUDICIAL DISTRICT COURT
COUNTY OF BONNEVILLE, IDAHO

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure, the following pre-trial schedule shall govern all proceedings in this case:

I. IT IS HEREBY ORDERED:

1. Formal pre-trial conference pursuant to Rule 16, I.R.C.P., will be held on December 5, 2011, at 10:00 a.m., at which time witness lists, exhibit lists and any proposed jury instructions must be filed.
2. Jury Trial shall commence at 1:30 p.m., on December 19, 2011.
No later than ninety (90) days before the date set for trial, counsel shall disclose the names, addresses, and telephone numbers of expert witnesses that may be called to testify at trial. a/20
4. All discovery shall be completed seventy (70) days prior to trial.¹ 10/10
5. All Motions for Summary Judgment must be filed sixty (60) days prior to trial in conformance with Rule 56(a), I.R.C.P. 10/20
6. All Motions for Summary Judgment must be heard at least twenty-eight (28) days prior to trial. 11/21

¹ Discovery requests must be served so that timely responses will be due prior to the discovery cutoff date.

II. IT IS FURTHER ORDERED that each attorney shall, no later than fourteen (14) 12/5 days before trial:

1. Submit a list of names to the court of persons who may be called to testify.
2. Submit a descriptive list of all exhibits proposed to be offered into evidence to the court indicating which exhibits counsel have agreed will be received in evidence without objection and those to which objections will be made, including the basis upon which each objection will be made.
3. Submit a brief to the court citing legal authorities upon which the party relies as to each issue of law to be litigated.
4. If this is a jury trial, counsel shall submit proposed jury instructions to all parties to the action and the court. All requested instructions submitted to the court shall be in duplicate form as set out in Idaho Rule of Civil Procedure 51(a)(1).
5. Submit that counsel have in good faith tried to settle this action.
6. State whether liability is disputed.

III. IT IS FURTHER ORDERED that each attorney shall no later than seven (7) days 12/12 before trial:

1. Submit any objections to the jury instructions requested by an opponent specifying the instruction and the grounds for the objection.
2. Deposit with the clerk of the court all exhibits to be introduced, except those for impeachment. The clerk shall mark plaintiff's exhibits in numerical sequence as requested by plaintiff and shall mark all defendant's exhibits in alphabetical sequence as requested by defendant.
3. A duplicate set of all exhibits to be introduced, except those for impeachment, shall be placed in binders, indexed, and deposited with the clerk of the court.


IV. IT IS FURTHER ORDERED that:

1. Any exhibits or witnesses discovered after the last required disclosure shall immediately be disclosed to the court and opposing counsel by filing and service stating the date upon which the same was discovered.
2. No exhibits shall be admitted into evidence at trial other than those disclosed,

listed and submitted to the clerk of the court in accordance with this order, except when offered for impeachment purposes or unless they were discovered after the last required disclosure.

3. This order shall control the course of this action unless modified for good cause shown to prevent manifest injustice.
4. The court may impose appropriate sanctions for violation of this order.

DATED this 24th day of January 2011.



JON J. SHINDURLING
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2011, I did send a true and correct copy of the aforementioned Order upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

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Courthouse Box

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Idaho Falls, ID 83402

Brent Manning
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Salt Lake City, UT 84111

Richard Armstrong
60 E South Temple, Suite 500
500 Eagle Gate Tower
Salt Lake City, UT 84111

RONALD LONGMORE
Clerk of the District Court

By: JW
Deputy Clerk

EXHIBIT H

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC.,

Plaintiff,

v.

RICK FOELLER and NATALIE
FOELLER,

Defendants.

Case No. CV-2009-2616

OPINION, DECISION, AND ORDER
ON PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

10 LEC-1 P358

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Melaleuca is an Idaho corporation that produces and markets various nutritional and cosmetic goods. The defendants Rick and Natalie Foeller case are former Melaleuca contractors residing in Ontario, Canada.

The Foellers entered into an Independent Marketing Executive Agreement with Plaintiff in September 1999. The IMEA requires contractors to pay \$39 CDN, for which they receive literature and are eligible to receive commissions and prizes for selling Plaintiff's products and for enrolling other independent marketing executives with Melaleuca. The Foellers received monthly commission checks from Melaleuca until November 2008, when they ended their relationship with Melaleuca.

The IMEA contains a non-compete clause and several provisions dealing with competition and solicitation.

At some point, Melaleuca learned that the Foellers were involved with a competing corporation, Max International, during their time with Melaleuca. The IMEA expressly allows Melaleuca contractors to work for other companies, but does not allow contractors to recruit existing Melaleuca customers into any other organizations. It now appears that the Foellers enrolled a number of Melaleuca customers in Max programs while receiving Melaleuca commissions.

On April 29, 2009, Melaleuca filed this lawsuit in Bonneville County, seeking an injunction requiring the Foellers to comply with the non-solicitation provisions of the IMEA and seeking damages for refunds of commission money paid to the Foellers since June 2008.

Following lengthy procedural wrangling, Melaleuca filed this motion for summary judgment on July 9, 2010. Melaleuca argues that it is entitled to a return of commissions paid out to the Foellers from the time they first violated the IMEA in June 2008, and that no question of fact remains on that issue. The Foellers argue that the amount requested by Melaleuca is incorrect, and that the provision cited by Melaleuca is unenforceable.

Following responsive briefing, this matter was called up for hearing on October 4, 2010. Following argument from counsel, the court took the matter under advisement.

After considering the court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the court renders the following opinion.

II.

STANDARD

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be

Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

III.

ANALYSIS

Melaleuca argues that summary judgment is appropriate on its claim for a repayment of \$31,860.64 CDN paid to the Foellers from June 2008 until they left Melaleuca. The Foellers argue that Melaleuca has failed to establish that \$31,860.64 is an accurate sum under the IMEA and that the provision in the IMEA is an unenforceable forfeiture clause.

Amount Sought

Melaleuca originally requested the repayment of \$31,860.64 in commissions. Melaleuca initially alleged that Tracy Leigh was among the Melaleuca customers improperly recruited to Max by the Foellers. However, at oral argument, Melaleuca conceded that the Foellers did not improperly enroll Leigh, and that the \$8,004.23 related to her sales should not be considered against the requested repayment. This lowers the requested amount to \$23,856.41.

The Foellers also argue that Melaleuca improperly calculates the amount paid to the Foellers. The Foellers allege that they were never paid for October 2008, commissions that would have amounted to \$7,968. Melaleuca argues that the \$7,968 for October was never included in its calculations.

Examining the testimony and evidence presented by Melaleuca, it appears that Melaleuca never included the \$7,968 in its calculations. The final commission payment that Melaleuca seeks was issued on October 17, 2008 for \$7,853.98, representing commission payments for September 2008. The Foellers do not appear to argue that they are entitled to the \$7,968 in

commission payments for October 2008.

\$23,856.41 appears to be an accurate sum representing the repayments currently sought by Melaleuca.

Policy 20

The parties' chief disagreement concerns the applicability and legality of Policy 20 of the IMEA.

Policy 20 is a lengthy section of the IMEA entitled Non-Solicitation and Conflicts of Interest. It forms the basis of Melaleuca's complaint against the Foellers. The Foellers argue that Policy 20 contains an illegal liquidated damages provision and that Melaleuca's cause of action is barred under Idaho law.

Policy 20 allows Melaleuca contractors to participate in other business activities while they work for Melaleuca. However, the IMEA contains a number of limitations on the competing business activities. The relevant limitation is: "During the period that their Independent Marketing Executive Agreements are in force Marketing Executives and all members of their Immediate Household are prohibited from directly, indirectly or through a third party recruiting any Melaleuca Customers or Marketing Executives to participate in any other business ventures." Policy 20 (a)(i).

The IMEA Melaleuca Definitions of Terms defines "recruit" as:

1) To attempt to enroll, enlist, or solicit an individual or entity to join a business, program or organization; or 2) to attempt to promote, influence or encourage an individual or entity to join a business, program or organization; or 3) to present, or participate or assist in the presentation of a business, program, organization or its products. To constitute recruiting, such efforts or attempts may be performed either directly through personal contact or indirectly through a third party.

Policy 20 also states:

Violation of any provision of this Policy 20 constitutes a Marketing Executive's voluntary resignation and cancellation of his/her Independent Marketing Executive Agreement, effective as of the date of the violation, and the forfeiture by the Marketing Executive of all commissions or bonuses payable for and after the calendar month in which the violation occurred.

Policy 20(c)(i).

Melaleuca argues that the quoted provisions of the IMEA allow it to demand repayment of all commission payments since June 2008, when the first violation of Policy 20 was alleged to have occurred. The Foellers argue that the forfeiture provision of Policy 20 constitutes a liquidated damages policy and an illegal penalty.

Liquidated damages policies are not per se unenforceable. The Idaho Supreme Court has held:

Generally speaking, parties to a contract may agree upon liquidated damages in anticipation of a breach, in any case where the circumstances are such that accurate determination of the damages would be difficult or impossible, and provided that the liquidated damages fixed by the contract bear a reasonable relation to actual damages.

Graves v. Cupic, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954).

Melaleuca argues that the provision is not a liquidated damages policy, because it does not set out a fixed amount the Foellers must pay regardless of the loss suffered by Melaleuca. Rather, the contract calls for the Foellers to now forfeit any commissions they received after violating the contract.

Generally, a provision for liquidated damages will enumerate a specific sum to be paid. See 25 C.J.S. Damages § 175 (Citing *Hamming v. Murphy*, 83 Ill. App. 3d. 1130, 404 N.E.2d 1026 (2d Dist. 1980) "It has been held that to be valid, a provision for liquidated damages must be for a certain sum.").

Though the clause in Policy 20 bears some similarity to a liquidated damages clause, it does not require a specific sum to be paid. The purpose of liquidated damages clauses is to allow parties to agree to a reasonable sum where it might otherwise be difficult to determine damages for a breach; here, the IMEA states exactly how the parties will determine what payment should be forfeited. Additionally, as Melaleuca points out, liquidated damages are often valid contract tools.

However, it is not necessary for a provision to be styled as a liquidated damages clause in order for it to be an illegal penalty. “[W]here the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage, and is exorbitant and unconscionable, it is regarded as a ‘penalty’, and the contractual provision therefore is void and unenforceable.” *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App.1999).

Clauses intended to punish a breaching party are not allowed in Idaho contract law. As the Court of Appeals states:

Historically, courts of equity developed a rule, later adopted by courts of law, that contractual clauses prescribing penalties for a breach of the contract would not be enforced because of the potential for over-reaching and unconscionable bargains. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS*, § 14-31, at 589 (4th ed.1998). Modern courts continue to refuse to enforce contract clauses that appear designed to deter a breach or to punish the breaching party rather than to compensate the injured party for damage occasioned by the breach. CALAMARI & PERILLO, *supra*, § 14.31, at 590. *See also Graves v. Cupic*, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954).

Magic Valley Truck Brothers, 133 Idaho at 117.

Melaleuca states that the amount requested is reasonable because it exactly matches the damages Melaleuca suffered as a result of paying commissions to the Foellers. This argument is unconvincing based on the evidence currently before this court. Melaleuca seeks to retroactively

take money paid to the Foellers for sales commissions; there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers' work as contractors for Melaleuca or that these are recognizable damages. Rather, it appears that, lacking other evidence, Policy 20(c)(1) acts solely to "deter a breach or to punish the breaching party."

There remains a genuine issue of material fact as to what damages Melaleuca suffered as a result of the Foellers' recruitment of Melaleuca customers and executives into Max. Summary judgment is not appropriate on this issue and will be denied.


IV.

CONCLUSION

Plaintiff's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

Dated this 17 day of December, 2010.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of December, 2010, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Attorneys for Plaintiff

James R. Holman
Thomsen Stephens Law Offices
2635 Channing Way
Idaho Falls, ID 83404

Brent Manning
Manning Curtis Bradshaw & Bednar
170 South Main St., Ste. 900
Salt Lake City, UT 84101

Attorney for Defendants

Richard J. Armstrong
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by

Glenn W. Wooten
Deputy Clerk

James R. Holman, Esq., ISB # 2547
Richard R. Friess, Esq., ISB #7820
THOMSEN STEPHENS LAW OFFICES PLLC
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BONNEVILLE COUNTY, IDAHO
2011 NOV -7 PM 4:17

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Ryan D. Nelson, Esq., ISB # 8357
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho)
corporation,)
)
Plaintiff,)
)
v.)
)
RICK AND NATALIE FOELLER,)
individuals,)
)
Defendants.)
_____)

Case No. CV-09-2616

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR
FOR SUMMARY JUDGMENT**

Plaintiff Melaleuca, Inc. (“Melaleuca”) respectfully submits this Memorandum in Opposition (“Opposition” or “Opp.”) to Defendants’ Motion for Summary Judgment (“Motion,” or the Memorandum in Support, the “Memo”) in the above-captioned matter. For the reasons set forth herein, the Motion should be denied.

INTRODUCTION

Defendants argue that Plaintiff’s case must be dismissed because, even though Defendants’ liability is established, Melaleuca has allegedly provided no reasonably certain evidence of damages. Melaleuca has already submitted to the Court, however, evidence to substantiate damages of more than \$23,855.81 CDN, including both 1) uncontroverted evidence as to exact amount of the commissions paid to the Foellers which were paid in error and were not in fact due; and 2) expert testimony, signed by the expert and submitted in accordance with the relevant Rules of Civil Procedure, to the effect that the other harms suffered by Melaleuca caused damage substantially in excess of \$23,855.81 CDN. This evidence is more than enough to create a genuine issue of material fact as to both the fact and amount of damages.

Even absent Melaleuca’s evidence, Defendants’ motion would fail because it confuses the fundamental distinction between evidence showing the **fact** of harm, and evidence sufficient to establish without speculation the **amount** of any such damages. The former is a required element of any claim, while the latter is not. Accordingly, Defendants have pointed to **no** Idaho decision doing what they ask this Court to do—dismiss claims on summary judgment for failure to submit evidence of the **amount**, as opposed to the **fact**, of damages.

Contrary to Defendants’ argument, there can be no serious dispute on this record that Melaleuca **did** suffer actual harm as a result of Defendants’ actions. Melaleuca has submitted evidence (which is uncontroverted) proving that the Foellers recruited Gwen and Ledell Miles

and Laraine Agren (among many, many others) into Max. These individuals were long-time, high-level Marketing Executives whose efforts on behalf of Melaleuca were very valuable to the company. The loss of the purchases and efforts of these Marketing Executives would be enough harm, by itself, to avoid summary judgment on Defendants' theory.

Thus, if it were to be shown (which it has not been) that no sufficiently certain evidence establishes the amount of damages, Melaleuca would still be entitled to proceed with its claims and recover nominal damages plus costs and fees, as warranted under applicable law. It would not justify dismissal of all such claims.¹

Finally, Defendants' Motion fails because the complaint contains a claim for injunctive relief. Regardless of whether or not the amount of the harm can be proven, the claim for injunctive relief would still stand, provided harm has been suffered or may be suffered in the future. Accordingly, and for all these reasons, Defendants' motion should be denied.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment may not be granted unless the moving party meets its burden to establish that 1) "there is no genuine issue of material fact" and 2) "that the moving party is entitled to judgment as a matter of law." IRCP 56(c); *G & M Farms v. Fund Irrigation Co.*, 119 Idaho 514, 516-17 (1991); *Thompson v. City of Idaho Falls*, 126 Idaho 587, 590 (Ct. App. 1994).

¹ As set forth more fully in Melaleuca's Motion for Relief Pursuant to Rule 56(f) and Motion to Continue Trial, filed contemporaneously herewith, Melaleuca is willing to accept the \$23,855.81 CDN in commissions which the Foellers wrongfully obtained (plus any legally recoverable costs or fees) as sufficient damages in this case, and accordingly did not previously request that its expert provide a detailed opinion as to the lost profits and similar damages the Foellers' breaches caused. Melaleuca did so because the Court's December 1, 2010 Memorandum Opinion only held that Melaleuca could not prevail as a matter of law, on the record then before the Court. This would of course allow Melaleuca still to pursue recovery of the wrongly paid commissions at trial, assuming this Court does not grant Melaleuca's pending Motion for Reconsideration.

In making these determinations, the Court must “construe the record in the light most favorable to” Melaleuca, “drawing all reasonable inferences in [Melaleuca’s] favor.” *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890 (2010). “Summary judgment is improper if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.” *Id.*

II. MELALEUCA HAS PRODUCED EVIDENCE SUFFICIENT TO ESTABLISH THE FACT AND AMOUNT OF DAMAGES

Defendants argue that Melaleuca cannot prove at trial either that it has been damaged by the Foellers or the amount of that damage. Defendants are wrong. Melaleuca is entitled to produce at trial further evidence establishing and supporting its very specific claim for the \$23,855.81 CDN the Foellers fraudulently obtained from Melaleuca, regardless of its general interrogatory and deposition responses,² and regardless of this Court’s prior ruling declining to grant summary judgment to Melaleuca.

Defendants’ reliance on Melaleuca’s general interrogatory and deposition responses is misplaced. Defendants admit they were well aware of all of the specifics of Melaleuca’s Policy 20(c)(i) claim for wrongly paid commissions more than a year ago—and after they received Melaleuca’s discovery responses. *See* Memo at 10-12. As a result, Defendants are not prejudiced by allowing Melaleuca to submit evidence and argument as to this claim at trial.

Defendants’ attempt to attribute preclusive effect to this Court’s denial of Melaleuca’s motion for summary judgment fares no better. As this Court itself expressly noted, its decision was limited because it was “based on the evidence currently before this Court.” Memo at 12, *citing* Memorandum Decision of December 1, 2010. Moreover, the Court was required, on

² An amended response submitted by Melaleuca, to clarify Defendants’ apparent misunderstanding as to the amount of damages sought, is attached hereto as Exhibit A.

summary judgment, to construe the record in the light most favorable to Defendants, whereas a jury is under no such compulsion. *See, e.g., Wesco*, 149 Idaho at 890.

Accordingly, Defendants' claim that "the Court's SJ Opinion should have signaled to Plaintiff that it needed to present evidence of actual damages, and that without such evidence, Policy 20(c)(1) is an illegal and unenforceable penalty as it relates to this case," (Memo at 12) is simply not true. The Court's opinion, like all denials of summary judgment, simply held that when construing all the evidence then in the record in the light most favorable to the Foellers, **the Court** could not rule for Melaleuca as a matter of law. The Court did not rule that more facts were needed before a **jury** could hold Policy 20(c)(1) enforceable after a full trial. When summary judgment is denied, the losing party is not thereby barred from going to trial, even on precisely the same facts, because the standards to be applied by the trier of fact differ substantially from the summary judgment standard.

Thus, Defendants' claim that summary judgment should now be granted because "nothing has changed in this case from an evidentiary standpoint since the SJ Opinion" (Memo at 12) is wrong. Nothing evidentiary is or was required to change in order for a trial to take place. If Defendants wanted to obtain a pretrial resolution of the Policy 20(c)(i) claims and prevent the jury from hearing evidence related to them, Defendants should have filed their own motion for summary judgment as to Policy 20(c)(1).³ Having failed to do so, Defendants cannot now be permitted to accomplish the same objective by different means.

³ Melaleuca has now submitted additional evidence in any event, in support of its Motion for Reconsideration. To avoid duplication of records and overburdening the Court with excessive and duplicative factual material, Melaleuca hereby incorporates by reference into this Opposition to Defendants' Motion for Summary Judgment, as if referenced in full and attached hereto, the lengthy affidavits and exhibits attached to 1) Melaleuca's initial Motion for Summary Judgment, and 2) Melaleuca's Motion for Reconsideration. Those affidavits and exhibits are hereby expressly made part of the record submitted in opposition to Defendants' Motion for Summary Judgment, and Plaintiff respectfully requests that they be considered by the Court in deciding whether or not a genuine issue of

Defendants also wrongly claim, without any authority, that “the time for producing [additional] evidence [as to the Policy 20(c)(i) claim] expired on October 10, 2011.” Memo at 13. That is not the regime contemplated by the Idaho Rules of Civil Procedure. Under the Rules, Melaleuca is required to respond, by the discovery cut-off, to Defendants’ proper discovery requests, and to supplement those responses in a timely manner if and as required by I.R.C.P. 26(e). It is not required to produce in discovery all evidence upon which it intends to rely at trial, upon pain of summary dismissal. For example, Melaleuca is perfectly free to offer testimony supporting Melaleuca’s claims, regardless of whether or not that testimony was previously obtained by Defendants in discovery.⁴ Defendants’ argument that Melaleuca’s evidence is insufficient, before Defendants or the Court have had the opportunity to hear the evidence, is without merit.

III. ONLY THE FACT, NOT THE AMOUNT, OF DAMAGES NEED BE ESTABLISHED TO AVOID SUMMARY JUDGMENT

Even if it were true that the amount of Melaleuca’s damages were not subject to reliable proof, Melaleuca’s claims would still survive summary judgment. As noted in the RESTATEMENT (SECOND) OF CONTRACTS § 346(1-2) “The injured party has a right to damages for any breach by a party against whom the contract is enforceable” but “[i]f the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss **will be** awarded as nominal damages.” (emphasis

material fact exists as to the issues raised in Defendants’ Motion.

⁴ Had Defendants filed a motion for summary judgment as to Melaleuca’s Policy 20(c)(i) claim, Melaleuca would of course be required to produce evidence sufficient to establish a genuine issue of material fact with respect to this claim. While Defendants have brought no such motion, Melaleuca believes that the documents and evidence submitted in support of its Motion for Summary Judgment and its Motion for Reconsideration (which documents are expressly made part of this summary judgment record—*see* note 3, *supra*) are sufficient not only to establish such an issue, but to compel summary judgment for Melaleuca.

added); *see also Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 503 (2004) (affirming award of nominal damages and \$300,000 in punitive damages in breach of contract case). Melaleuca has the right to establish the liability of Defendants for breaching the contract, and then to recover from Defendants nominal damages, if not more, as well as costs and attorney's fees under the IMEA and Idaho law. *See id.*

Neither Idaho Jury Instruction 6.10.1 nor any of the cases cited by Defendants is to the contrary. Idaho Jury Instruction 6.10.1 is an instruction as to which party has the burden of proving damages in a contract case. It says nothing about whether a plaintiff can prove liability, prevail, and recover nominal damages plus costs and fees. Even if it did, Idaho cases such as *Myers* make clear that nominal damages are sufficient to allow a trial and even a punitive damage award.

Defendants' cases (Memo 8-9) are similarly inapposite. They hold only that a Plaintiff must prove the amount of damages with reasonable certainty in order to recover those damages. They do not hold that summary judgment as to **the claim itself** may be granted because the **amount** of damages was not proven with sufficient certainty. Indeed, counsel's diligent search has uncovered no Idaho case that has **ever** dismissed a plaintiff's substantive claim on summary judgment based on failure to show the amount of damages with reasonable certainty.⁵

Defendants' further contention, that Melaleuca has submitted no evidence sufficient to establish the **fact** of damages, is simply wrong. In addition to the \$23,855.81 CDN the Foellers

⁵ Defendants' real argument appears to be that evidence of damages should be barred at trial because of Plaintiff's discovery responses, entitling them to summary judgment. As set forth in note 1, *supra*, should its motion for reconsideration be denied, Melaleuca is prepared to go to trial seeking only recovery of the \$23,855.81 CDN recoverable under Policy 20(c)(i) and (ii), plus fees and costs as allowable. Melaleuca also respectfully requests the opportunity (pursuant to the accompanying Rule 56(f) motion) to prepare for submission expert testimony as to **all** of its damages for use at trial.

were wrongly paid, Melaleuca has also produced evidence that the Foellers recruited at least the individuals listed in Melaleuca's initial summary judgment motion, as well as Gwen and Ledell Miles and Laraine Agren (as set forth in Melaleuca's Motion for Reconsideration). The loss of these customers is evidence from which the jury could infer that Melaleuca suffered harm due to Foellers' actions.

IV. MELALEUCA IS ENTITLED TO PURSUE INJUNCTIVE RELIEF IN ANY EVENT

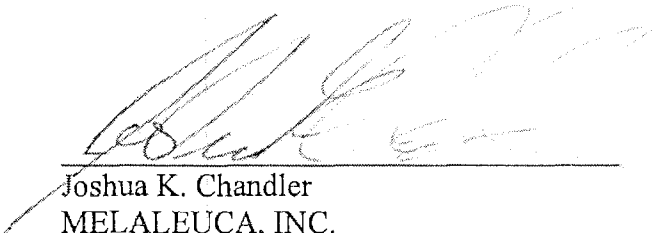
Finally, Defendants' exclusive focus on damages ignores the fact that Melaleuca has also requested injunctive relief against the Foellers. Once the fact of harm has been established, Melaleuca is entitled to pursue its claims for injunctive relief regardless of whether or not **amount** of damage it sustained is subject to proof. *See, e.g., Aztec, Ltd. v. Creekside Inv. Co.*, 100 Idaho 566, 568 (1979) (an invasion of a legally protected right is sufficient to permit recovery of nominal damages and granting of injunctive relief).

Here, Melaleuca has requested and is entitled to injunctive relief forbidding the Foellers from violating Policy 20 and/or using Melaleuca's proprietary information for their own purposes, including without limitation, to recruit Melaleuca Customers to another business venture. *See* Affidavit of Richard J. Armstrong in Support of Plaintiff's Motion for Summary Judgment ("Armstrong Aff."), Exhibit A, Complaint ¶ 8, Prayer ¶ 2. In addition, Defendants have also tortiously interfered with Melaleuca's contractual relations with other Marketing Executives, by aiding, abetting, encouraging, and profiting from those breaches, and Melaleuca is entitled to an injunction forbidding further such tortious interference. *See id.*, Complaint ¶ 8.

CONCLUSION

For the reasons set forth above, the Motion should be denied.

Respectfully submitted this 7th day of November, 2011.



Joshua K. Chandler
MELALEUCA, INC.
3910 S. Yellowstone Hwy
Idaho Falls, ID 83402
(208) 522-0700 telephone
(208) 534-2866 fax

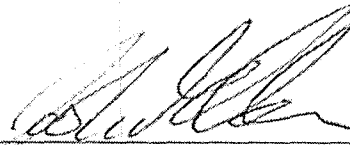
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be served in the method indicated below to the below-named parties this 7th day of November, 2011.

☐ HAND DELIVERY
☐ U.S. MAIL
☒ FAX TRANSMISSION
☒ E-MAIL TRANSMISSION

Richard J. Armstrong, Esq.
500 Eagle Gate Tower
Salt Lake City, Utah 84111
Attorney for Rick and Natalie Foeller



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EXHIBIT A

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Fax (208) 534-2063

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
RICK AND NATALIE FOELLER,)
individuals,)
)
Defendants.)
_____)

Case No. CV-09-2616

PLAINTIFF'S AMENDED RESPONSES
TO DEFENDANTS' THIRD SET OF
INTERROGATORIES

Pursuant to Rules 33, 34, and 36 of the Idaho Rules of Civil Procedure, Plaintiff Melaleuca, Inc. ("Plaintiff") hereby provides the following supplemental response to Interrogatory No. 1 of Defendants' Third Set of Interrogatories. This responses are subject to, and made without waiving, the objections set forth by Melaleuca in prior responses.

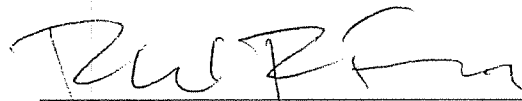
INTERROGATORY NO. 1: State the specific dollar amount of damages you claim were caused by Defendants' alleged violations of Policy 20.

ANSWER: As to restitution, Defendants' action caused at least \$23,855.81 CDN in damage to Melaleuca because Melaleuca paid commissions totaling that amount to Defendants after they materially breached the agreement by violating Policy 20. Policy 20(c) provides for contractual recovery of those amounts. In addition, Plaintiff has already submitted an expert report and affidavit in which Plaintiff's expert testifies that the damages in the form of lost profits would be far in excess of \$23,855.81. In the event that an additional report is prepared, Defendants should look to that report for a fuller enumeration; Plaintiff does not intend to provide another amended response.

DATED this 7 day of November, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Richard R. Friess, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 7 day of November, 2011, I caused a true and correct copy of the foregoing AMENDED RESPONSES TO DEFENDANTS' THIRD SET OF INTERROGATORIES to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

RICHARD J. ARMSTRONG, ESQ
500 EAGLE GATE TOWER
SALT LAKE CITY, UT 84111
FAX: (801) 366-6061

☒ Mail
☐ Hand Delivery
☐ Facsimile
☐ Email

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____

Richard R. Friess, Esq.

CRT:RRF:skp
4550-021\033 AMD RESP TO DEF 3RD INT.wpd

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BONNEVILLE COUNTY, IDAHO

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Telephone (208) 522-0700
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
RICK FOELLER and NATALIE FOELLER,)
)
Defendants.)
_____)

Case No. CV-09-2616

RULE 56(f) MOTION

COMES NOW Plaintiff, by and through counsel of record, and requests that the Court issue its order under Rule 56(f) IRCP, continuing any hearing on Defendants' Motion for Summary Judgment on November 21, 2011 for the following reasons:

1. Defendants' Motion for Summary Judgment contends that Plaintiff has failed set forth evidence of damages, in part because Plaintiff's expert witness disclosure did not set forth a specific calculation of Plaintiff's damages.

2. Plaintiff's expert, Roger Smith, needs additional time to prepare a more complete, detailed expert report.

3. Plaintiff believes there is adequate evidence of Plaintiff's damages in the record to withstand summary judgment. See Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment. Plaintiff further believes that it is entitled to summary judgment awarding Plaintiff \$23,855.81 CDN pursuant to Policy 20(c). See Plaintiff's Motion for Reconsideration.

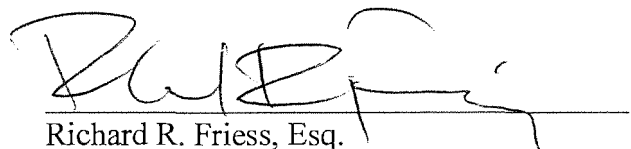
4. However, Plaintiff requests that, if the Court is not inclined to grant Plaintiff's Motion for Reconsideration, the Court grant Plaintiff an extension of time for Mr. Smith to complete his expert report before responding to Defendants' motion for summary judgment and before the trial of this action.

Oral argument is requested.

DATED this 7 day of November, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Richard R. Friess, Esq.

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on November 7, 2011, I caused a true and correct copy of the foregoing **RULE 56(f) MOTION** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

RICHARD J. ARMSTRONG
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☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Courthouse Box

THOMSEN STEPHENS LAW OFFICES, PLLC

By:


Richard R. Friess, Esq.

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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,)	
	)	MEMORANDUM IN OPPOSITION TO
vs.	)	PLAINTIFF'S MOTION FOR
	)	RECONSIDERATION OF MOTION
	)	FOR SUMMARY JUDGMENT
)	
RICK FOELLER and NATALIE)	
FOELLER,	)	Civil No. CV-09-2616
)	
Defendants.	)	Judge Jon J. Shindurling
)	

INTRODUCTION

As applied in this case, Melaleuca's policy requiring forfeiture of all commissions earned after a breach of an Independent Marketing Executive Agreement ("IMEA") is an illegal and unenforceable penalty. Melaleuca has stated that this policy is intended to give Melaleuca the ability to punish those whom it believes are straying from the fold. Nevertheless, controlling law is clear: a forfeiture provision that imposes a fine solely to punish the violating party is void and unenforceable.

To decide whether a contractual provision is an unenforceable penalty, this Court must determine whether there is some reasonable relation between the penalty imposed and the alleged damage suffered by Melaleuca. But Melaleuca has not provided any non-speculative evidence of its alleged damages. Thus, there is no evidence establishing a reasonable relation between Melaleuca's alleged damages and the penalty Melaleuca is seeking to enforce. Accordingly, Melaleuca cannot establish that it is entitled as a matter of law to enforce its forfeiture policy in this case.

This Court correctly recognized as much in its *Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment* (the "SJ Decision") issued on December 1, 2010. Although discovery has concluded, nothing has changed since the Court issued the SJ Decision. Melaleuca has still not provided any non-speculative evidence of either the fact or the amount of its alleged damages. Thus, the Court's analysis in the SJ Decision is as potent today as it was nearly a year ago, and the Court should deny Melaleuca's Motion for Reconsideration of Motion for Summary Judgment (the "Motion").

The evidence presented by Plaintiff in its Motion has never previously been disclosed to Defendants, despite Defendant requesting in discovery the specific amount of damages allegedly caused by Defendants. The time for producing discovery responses to Defendants' request expired on October 10, 2011. As a matter of fairness and due process, Plaintiff should not be allowed to produce all of its damages evidence in a motion for reconsideration *after* discovery has ended. Moreover, most if not all of the affidavit testimony presented by Plaintiff in support of its motion for reconsideration should be stricken on grounds the affidavits are rife with hearsay, speculation, lack foundation, and assume facts that are not in

evidence. Accordingly, the affidavits should be stricken as demonstrated in the motions to strike filed contemporaneously herewith. For this reason alone, Plaintiff's motion for reconsideration should be denied.

STATEMENT OF FACTS

1. Melaleuca has never provided conventions, trainings and promotions specifically for Ms. Foeller's business organization. *See Affidavit of Natalie Foeller* (the "Foeller Affidavit"), filed contemporaneously herewith.

2. Natalie and Rick Foeller spent thousands of dollars traveling, offering promotions, and conducting numerous events, for the specific purpose of growing their business organization. When members of their downline business organization attended conventions, they paid out of their own pocket to attend. They, and the Foellers, paid for the flight, hotel, and food at those events. *See Foeller Affidavit*.

3. Ms. Foeller was more closely connected to her business organization than most would be and constantly provided support and presentations as evidenced by the leadership points she earned consistently month after month. *See Foeller Affidavit*.

4. It is the nature of network marketing that a particular business organization will grow by a marketing executive's efforts rather than by the efforts of those who are trained by other marketing executives. Ms. Foeller earned on average more leadership points than others, which shows she did more meetings and presentations than the average marketing executive. *See Foeller Affidavit*.

5. The \$1.7 million paid to the Foellers over the years was directly related to commissions on product purchased and sold by Ms. Foeller's organization. Aside from bonuses earned by growing the organization, all income earned was from commissions for product that her organization purchased and sold. For example, for the month of September 2008, the last month she received compensation, Ms. Foeller's organization produced 67,089 points. This equates to at least \$140,000 paid to Melaleuca for product by Ms. Foeller's organization. From these purchases, Ms. Foeller received \$167.40 for leadership "pool" money, \$1,200 for a car allowance, and \$6,312.83 for commissions on her organization. The car bonus is provided to marketing executives that have achieved a sales volume of 50,000 with ten (10) personal directors. Whether Ms. Foeller grew or did not grow, trained, or did not train, her organization, she still earned this car allowance month after month as a result of her team's sale of products, not because of training, supporting, or motivating her downline. *See Foeller Affidavit.*

6. The compensation paid to Ms. Foeller in July, August, and September 2008 were in the following amounts:

<u>MONTH</u>	<u>AMOUNT</u>
July 2008	\$6,711.55
August 2008	\$7,538.99
September 2008	\$7,612.17
TOTAL	\$21,862.71

7. These amounts are found in monthly summary reports produced by Melaleuca in this case. These documents were provided to Ms. Foeller on a regular basis during the time she was a marketing executive at Melaleuca. Copies of these documents are attached to Ms. Foeller's affidavit as Exhibit 1.¹

8. Each of these three pages identifies a particular item of compensation. In the first page, every item listed in the summary refers to commissions for the sale of products or services. The "Organization Commission" refers to the commission paid for the sale and purchase of products within Ms. Foeller's downline organization. There is also a "Career/Value Pack Commission," a "Services Bonus," and a "VFL.com Bonus." The "VFL.com Bonus" refers to "Vitality for Life," which relates to the sale of specific health products. Each of these items of compensation refers to the sale of products and/or services by Ms. Foeller's downline organization. Importantly, none of these items on the first page refers to compensation for training or leadership activities. *See Foeller Affidavit and Ex. 1 thereto.*

9. The second and third pages in Exhibit 1 relate to the *Commission and Bonus Summary* for August and September 2008. These pages contain similar entries to the first page, but refer to an "Executive Director Car Bonus," and an "Executive Director Pool" bonus. The Executive Director Pool is the only item of compensation on these two sheets that relate to Ms. Foeller's leadership activities within Melaleuca. *See Foeller Affidavit.*

¹While these documents were previously designated by Melaleuca as "Sensitive" and "Confidential" under the protective order in this case, Melaleuca agreed to undesignate these three pages prior to Defendants' filing this opposition memorandum.

10. As shown in the July 2008 *Commission and Bonus Summary*, the entire check in July 2008 was for commissions on product and services purchased and sold within Ms. Foeller's business organization. *See* Ex. 1 to the Foeller Affidavit.

11. As shown in the August 2008 *Commission and Bonus Summary*, out of the \$7,538.99 paid to Ms. Foeller, \$7,483.55 of this amount was based entirely on commissions on product and services purchased and sold within Ms. Foeller's business organization. *See* Ex. 1 to the Foeller Affidavit.

12. As shown in the September 2008 *Commission and Bonus Summary*, out of the \$7,612.17 paid to Ms. Foeller, \$7,444.77 of this amount was based entirely on commissions on product and services purchased and sold within Ms. Foeller's business organization. *See* Ex. 1 to the Foeller Affidavit.

13. In sum, if any amounts were paid to Ms. Foeller for leadership activities for the months of July, August, and September 2008, such amount totaled only \$222.84. *See* Ex. 1 to the Foeller Affidavit.

14. Ms. Foeller trained and supported her downline organization up until the time she resigned her marketing executive position with Melaleuca on November 13, 2008. Therefore, she earned all amounts paid to and received by her for training, support, and leadership activities, as well as for products purchased and sold within her business organization. *See* Foeller Affidavit.

15. Prior to that date, Ms. Foeller trained and supported her downline organization. Indeed, Melaleuca refused and has continued to refuse to pay Ms. Foeller's check for October 2008, totaling \$7,968. *See* Foeller Affidavit.

16. Like the other checks, most if not all of this amount related to the purchase and sale of product and services within Ms. Foeller's business organization. *See* Foeller Affidavit.

17. Therefore, contrary to Mr. Vandersloot's affidavit, the compensation paid to Ms. Foeller in the last three months was almost exclusively for commissions earned on actual product bought and sold by her organization, and not for training, motivating, or leadership activities. The relatively small amounts paid to Ms. Foeller for that time period for training, motivating, or leadership activities were earned by her as a result of her performance of those duties. *See* Foeller Affidavit.

ARGUMENT

I. PENALTY CLAUSES ARE VOID AND UNENFORCEABLE.

"Historically, courts of equity developed a rule, later adopted by courts of law, that contractual clauses prescribing penalties for a breach of the contract would not be enforced because of the potential for over-reaching and unconscionable bargains. . . . Modern courts continue to refuse to enforce contract clauses that appear designed to deter a breach or to punish the breaching party rather than to compensate the injured party for damage occasioned by the breach. *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Idaho Ct. App. 1999) (citations omitted).

It is a long-established principle in Idaho that "[e]quity abhors forfeitures." *Stringer v. Swanstrum*, 66 Idaho 752, 760, 168 P.2d 826, 830 (Idaho 1946), and that "[e]quity will not grant specific performance of a forfeiture unless the failure to do so would lead to an unconscionable result." *Sullivan v. Burcaw*, 35 Idaho 755, 208 P. 841 (Idaho 1922), *as quoted in*

Graves v. Cupic, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (Idaho 1954). See also *Dohrman v. Tomlinson*, 88 Idaho 313, 319, 399 P.2d 255, 259 (Idaho 1965) (“Forfeitures are abhorrent to the law and all intendments are against them.”); and *Magic Valley Truck Brokers*, 133 Idaho at 117, 982 P.2d at 952.²

A forfeiture clause is a penalty when “the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage.” *Graves*, 75 Idaho at 456, 272 P.2d at 1023. Such forfeiture clauses are void and unenforceable. *Id.*³

²Any argument that the rule holding penalty clauses void and unenforceable does not apply because Melaleuca is seeking legal relief must fail. The Idaho Supreme Court has held that “[f]orfeitures are abhorrent to the *law*. . . .” *Dohrman*, 88 Idaho at 319, 399 P.2d at 259 (emphasis added). As mentioned in *Magic Valley Truck Brokers*, law has adopted the equitable rule. *Magic Valley Truck Brokers*, 133 Idaho at 117, 982 P.2d at 952. And the Idaho Supreme Court has held that “[a]ctions to forfeit contractual rights of the defaulting party, pursuant to a forfeiture clause, are addressed to the courts equitable discretion.” *Thomas v. Klein*, 99 Idaho 105, 107, 577 P.2d 1153, 1155 (Idaho 1978).

³Although this analysis is usually applied in cases involving liquidated damages clauses, the rule against forfeiture and penalty clauses need not be applied only in those situations. As recognized by the Idaho Supreme Court, an unenforceable penalty “exists where there is an attempt to enforce an obligation to pay a sum fixed by agreement of the parties as a *punishment* for the failure to fulfill some primary contractual obligation.” *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 259, 846 P.2d 904, 910 (Idaho 1993), quoting *Mahoney v. Tingley*, 85 Wash.2d 95, 529 P.2d 1068 (Wa. 1975). And as this Court recognized in the SJ Decision, not all clauses demanding payment of a fixed sum are *per se* liquidated damages clauses. One commentator has recognized that “a clause that either prevents breach by coercing performance, or that punishes breach after it occurs, is void as a penalty,” 24 Williston on Contracts 65:1 (4th ed.), making no distinction between liquidated damages clauses and any other clause that coerces performance or punishes breach.

II. MELALEUCA HAS PROVIDED NO EVIDENCE TENDING TO SHOW THAT THE FORFEITURE IT IS SEEKING IS REASONABLY RELATED TO THE DAMAGE IT HAS ALLEGED AND IS NOT ARBITRARY.

Although discovery has ended, Melaleuca has not produced any evidence regarding the fact or the amount of its alleged damages, and there is no way that this Court can determine if the forfeiture of \$23,856.41 in commissions is arbitrary or bears a reasonable relation to Melaleuca's damages. Therefore, there is no factual basis upon which the Court can make a determination that Melaleuca's forfeiture policy is or is not an unenforceable penalty. Accordingly, there is no factual or legal basis upon which this Court can base a decision to reconsider its earlier SJ Decision.

When alleging breach of contract or tort liability, a plaintiff bears the burden of providing non-speculative evidence of both the fact and the amount of its alleged damages. *See Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997), *citing Wing v. Hulet*, 106 Idaho 912, 919, 684 P.2d 314, 321 (Ct. App. 1984), *and Eliopulos v. Kondo Farms, Inc.*, 102 Idaho 915, 919, 643 P.2d 1085, 1089 (Ct. App. 1982) ("Damages, **and** the amount thereof, must be proven to a reasonable certainty.") (Emphasis added). Thus, "the measure of damage – as well as the fact of damage – must be proven **beyond speculation.**" *Wing*, 106 Idaho at 919 (emphasis added), *citing Eliopulos*, 102 Idaho 915. "Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to **remove the existence of damages from the realm of speculation.**" *Griffith v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 740, 152 P.3d 604, 611 (2007) (emphasis added).

A. Melaleuca has not provided any evidence establishing the fact of its alleged damages.

Melaleuca has not, either in deposition or in response to written discovery, produced any non-speculative evidence that Defendants' alleged actions have actually caused damage. As explained in Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment (the "Defendants' SJ Motion") which was filed with this Court on October 20, 2011, and which is incorporated herein by reference, in its Rule 30(b)(6) deposition, Melaleuca was not able to provide any specific testimony regarding damage, and stated that an expert was required to calculate such damages. *See* Ex C. to the Affidavit of Richard Armstrong (the "Armstrong Affidavit"), which is attached to Defendants SJ Motion, at 110:19-23.

Furthermore, in response to Defendants' Third Set of Interrogatories and Requests for Production of Documents, Melaleuca provided no information that could be used to infer the existence or dollar value of the alleged damage. Instead, Melaleuca responded that the amount of damages would be calculated by an expert and that the expert would be disclosed by no later than September 20, 2011. Although Melaleuca promised to produce not only the dollar amount of its damages by that date, it also represented that it would produce its expert's report on that same date, which it never did. *See* Armstrong Affidavit. As a result, there is no evidence from which the fact of damage can be inferred.

The only thing supporting Melaleuca's claim of damage is the general allegation in its Complaint. But "Rule 56(e) requires a party to respond to a motion for summary judgment with something more than relying on the mere allegations or denials in the pleadings." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833, 801 P.2d 37, 40 (Idaho 1990).

B. Melaleuca has not provided any evidence regarding the amount of its alleged damages.

Melaleuca has also not produced any evidence regarding the dollar value of its claims. In deposition, Melaleuca testified that it was “[v]ery hard to measure or for me to place a value or project what those damages are. Therefore, we’re going to engage a special consultant to help or assist us in putting a value or a damage assignment.” Statement of Undisputed Fact (“SOUF”) accompanying Defendants’ SJ Motion at ¶ 13.

In response to written interrogatories and requests for production, Melaleuca responded that it was “in the process of determining the amount of damages caused by Defendants’ alleged violations of Policy 20 and will seasonably supplement this answer when the determination is made.” SOUF at ¶ 17. Melaleuca also stated that it would provide a copy of its expert’s report regarding damages “in accordance with the expert witness disclosure cutoff date in the Court’s January 25, 2011 Scheduling Order.” SOUF at ¶ 25.

While it provided the name and address and *curriculum vitae* of an expert witness, Melaleuca never provided any expert opinion regarding the amount of its alleged damages, and has not otherwise supported any such opinion with the materials requested in discovery. According to this Court’s January 25, 2011 Scheduling Order, the deadline for completing *all* discovery was October 10, 2011. SOUF at ¶ 28.

C. Melaleuca cannot rely upon the affidavits and documentation filed with the Motion as admissible evidence of damages.

Melaleuca may attempt to overcome its failure during discovery to produce any evidence of damages by invoking the affidavits and documents it filed with the Motion. These affidavits and documents are inadmissible, however, and cannot be used to support the Motion.

For the reasons explained in the motions to strike filed concurrently with this memorandum, the affidavits and documents filed with the Motion must be stricken. Furthermore, discovery is now complete, and the universe of evidence upon which Melaleuca may base the Motion is limited to that evidence produced before close of discovery.

D. Melaleuca cannot show that its forfeiture policies as applied to Defendants are anything other than an unenforceable penalty.

In light of its failure to provide any evidence of damage, this Court cannot determine at this juncture whether the forfeiture policies, at least as applied to Defendants, are unenforceable penalties. Melaleuca is obligated to show that the penalty it seeks to enforce bears a reasonable relation to its alleged injuries. Thus, in order to be entitled to summary judgment on its claims, Melaleuca must have provided evidence showing that there is no material factual dispute calling into question its assertion that its forfeiture policy is valid and enforceable. It has not done so.

Melaleuca has consistently punted the issue until it is now too late. There is no evidence that the amount of commissions paid to Defendants after their alleged breaches of contract is a reasonable estimate of the damage Melaleuca alleges it has suffered. As this Court recognized in the SJ Decision, “there is no argument or evidence that these commissions were not tied to profitable sales as a result of the Foellers’ work as contractors for Melaleuca or that these are recognizable damages. Rather, it appears that, lacking other evidence, Policy 20(c)(1) acts solely to ‘deter a breach or to punish the breaching party.’” Nothing has changed since the SJ Decision, and this Court’s reasoning is as correct today as it was nearly a year ago. It is interesting to note that Ms. Foeller, in her affidavit, testifies to the substantial benefit Melaleuca

received as a result of her being a marketing executive, even during the time she allegedly violated Policy 20. Ms. Foeller testifies:

[t]he \$1.7 million [paid to me over the years] was directly related to commissions on product purchased by my organization. Aside from bonuses earned by growing the organization, *all income earned was from commissions for product that my organization purchased.* For example, *for the month of September 2008, the last month I received compensation, my organization produced 67,089 points. This equates to at least \$140,000 paid to Melaleuca for product by my organization. From these purchases, I received \$167.40 for “pool” money, \$1,200 for a car allowance, and \$6,312.83 for commissions on my organization.*

Foeller Affidavit, ¶ 6 (emphasis added). Thus, the sale of products that led to the payment of Defendants’ commissions resulted in sales to Melaleuca, through which it apparently obtained a profit totaling \$132,319.77 for the month of September 2008 ($\$140,000 - \$6,312.83 - \$1,200 - \$167.40 = \$132,319.77$). Melaleuca has not proven otherwise.

Melaleuca cannot reasonably rely upon this Court’s decisions in *Blood v. Melaleuca, Inc.*, and *Jordan v. Melaleuca, Inc.* to justify its argument that it does not have to show damages. In both *Blood* and *Jordan*, whether Melaleuca’s forfeiture policy was an illegal penalty was never raised or addressed by the court in those cases. Although they contain broad statements regarding the enforceability of Melaleuca’s policies, these decisions do not shed any light on the question of whether Melaleuca’s policies constitute illegal penalties.

In the absence of any evidence establishing what its damages are, Melaleuca’s insistence that it can mandate the return of the commissions, regardless of what Defendants may have sold or done after the allegedly damaging conduct, makes it that much clearer that Melaleuca uses its policies to punish people that it believes have strayed. Melaleuca says that Defendants caused damage at specific points in time. Nevertheless, despite the specific instances

of allegedly improper behavior, Melaleuca is demanding the return of everything earned after those specific events. If Melaleuca could show that the return of everything was a reasonable estimation of the damage it alleges, such a request might be proper. But it has not done so.

Melaleuca simply wants everything back, regardless of whether it was actually injured, and regardless of whether Defendants' post-breach actions were of any value to Melaleuca. In short, Melaleuca wants to punish Defendants in a manner not permissible under Idaho law. This comports with Melaleuca's admission that Policy 20's forfeiture provision constitutes a "fine." *See* Ex. 2 to Armstrong Affidavit, filed with *Defendants' Opposition to Plaintiff's Motion for Summary Judgment*, filed September 22, 2010 ("Melaleuca has the **right** to impose **fin**es . . . including . . . withholding from outstanding commissions and bonuses." (Emphasis added)).

Melaleuca argues that commissions are "generally **not tied to any specific sales activity undertaken by that Marketing Executive** in a particular month" and are instead based on "leadership, training, support, and similar activities" provided to their downlines (*see* Motion at page 3). Melaleuca supports this argument with statements from affidavits of its CEO, Frank Vandersloot, and one of its in-house attorneys, Joshua Chandler, where they admit that in any given month, the commissions an executive receives are **not** tied to the sale of goods, services or intangible property, but to the provision of leadership, training and support to other Melaleuca executives. *See Affidavit of Joshua Chandler*, ¶ 8 ("[T]he compensation a Marketing Executive receives is based on leadership, training, support, and similar activities, and is generally not tied to any specific sales activity undertaken by that Marketing Executive in a particular month."); ¶ 8 ("Marketing Executives are entitled by contract to receive these (mostly residual) commissions

only while in good standing, including compliance with all of Melaleuca's Policies, and providing the leadership required by, *inter alia*, Policy 23."); Affidavit of Frank L. Vandersloot, ¶ 22 ("[T]he compensation received by the Foellers was in return for training and leadership activities expended by the Foellers.").

Melaleuca's argument in this regard is interesting because it potentially places Melaleuca into the category of an illegal pyramid scheme. Under Idaho Code § 18-3101(2)(k), a "[p]yramid promotional scheme" means any plan or operation in which a participant gives consideration for the right to receive compensation *that is derived primarily from the recruitment of other persons as participants in the plan or operation rather than from the sales of goods, services or intangible property* to participants or by participants to others." (Emphasis added). If there are no sales upon which commissions are based, as asserted by Messrs. Vandersloot and Chandler in their affidavits, then the importance of Defendants' leadership, training and support ultimately exists, not to ensure the sale of a product, but to ensure the retention of a person within Melaleuca's organization. Thus, based on statements in Plaintiff's supporting affidavits, Melaleuca may be functioning as an illegal pyramid scheme pursuant to the terms of Idaho Code § 18-3101(4). Surely, this cannot be the intent of Melaleuca and its executives.

Melaleuca couches its argument in general terms, arguing that commissions are "generally not tied to any specific sales activity undertaken by that Marketing Executive in a particular month." *See* Plaintiff's Motion at page 3. While Melaleuca may think this is the case "generally," with regard to this case and the \$23,855.81 in commissions paid to Defendants, and which Plaintiff seeks in its forfeiture request, these commissions were specifically tied directly to

sales activities of Defendants and their downline organization. Ms. Foeller testifies that the \$23,855.81 in commissions sought by Melaleuca was directly tied to the sale of product within her downline organization. *See* Affidavit of Natalie Foeller, filed contemporaneously herewith. She testifies further that nominal amounts of her compensation actually related to her leadership activities, but that these amounts were also tied to the sale of products.

III. PLAINTIFF'S MOTION SHOULD BE DENIED SIMPLY BY VIRTUE OF THE FACT PLAINTIFF FAILED TO DISCLOSE ITS DAMAGES.

Even if this Court reversed itself and ruled that Policy 20(c)(1) is not an unlawful penalty provision, this Court should nevertheless deny Plaintiff's motion for reconsideration because Plaintiff never disclosed its damages in this case.

As set forth in Defendants' motion for summary judgment, Defendants asked Plaintiff in discovery requests to disclose the amount of damages caused by Defendants' alleged conduct. In response to this request, Plaintiff stated that it did not know the amount of its damages, and that once it ascertained those damages through an expert witness, it would disclose the amount by the expert witness disclosure cut-off date, *i.e.*, September 20, 2011. *See* Affidavit of Richard J. Armstrong, filed with Defs' Mem. in Supp. of Mot. for Summ. J. This is the evidence Defendants relied on in preparing their defense relating to Plaintiff's damages. September 20, 2011 came and went, and Plaintiff never disclosed the amount of its damages. By October 10, 2011, the fact discovery cut-off date, Plaintiff still failed to provide its damages figure to Defendants. Plaintiff should not be allowed to come into court after fact discovery has ended and present its amount of damages in a new dispositive motion. It is fundamentally unfair

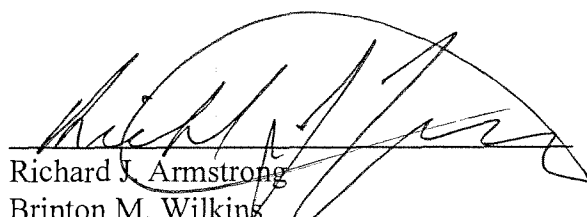
and violative of Defendants' due process rights for Plaintiff to be allowed to do so. This Court should therefore deny Plaintiff's motion for reconsideration for failure to disclose its damages.

CONCLUSION

This Court's earlier SJ Decision should not be disturbed. It is well-grounded on the record as the record existed at that time, and supported by well-established law. Melaleuca could have overcome the effect of the Court's December 2010 SJ Decision simply by producing actual evidence of its damages, and, concomitantly, the propriety of its forfeiture policy. It has failed to do so. Melaleuca had more than ten months to do so, and the fact that the summary judgment record is as it was back in December 2010, *i.e.*, completely devoid of evidence of actual damages, conclusively demonstrates that Melaleuca has not suffered any actual damages at the hands of Defendants. The SJ Decision is therefore as correct today as it was in December 2010. Plaintiff's motion for reconsideration should therefore be denied for the reasons set forth in that decision, as well as those set forth above and in Defendants' SJ Motion.

DATED this 7th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR

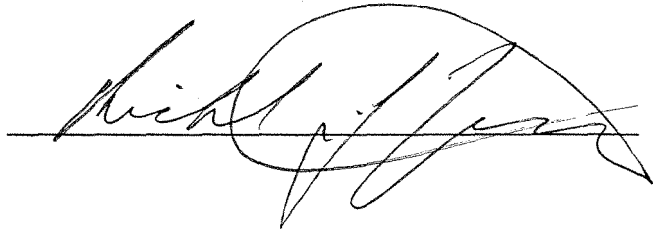
RECONSIDERATION OF MOTION FOR SUMMARY JUDGMENT to the following:

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jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.

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WOOD JENKINS LLC
Richard J. Armstrong ISBN 5548
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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

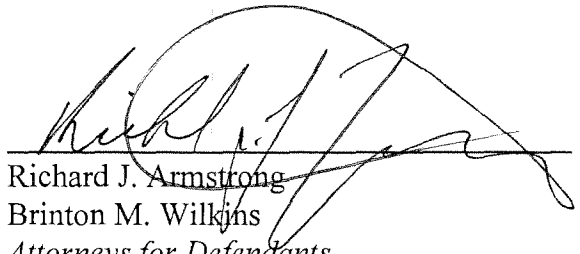
MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>MOTION TO STRIKE AFFIDAVIT OF</i>
	)	<i>ROGER SMITH</i>
)	
vs.)	
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	Judge Jon J. Shindurling
Defendants.)	
)	
)	

Defendants Rick and Natalie Foeller, by and through their counsel of record, hereby move the Court for an order striking the “*Affidavit of Roger Smith in Support of Plaintiff’s Motion for Reconsideration.*” The grounds for this motion include lack of foundation for Mr. Smith’s testimony regarding damages, and Plaintiff’s failure to disclose any expert testimony of Mr. Smith within the deadline set by the Court in its *Order Setting Pre-Trial Conference and Jury Trial*, entered January 25, 2011. The entire affidavit of Mr. Smith should be stricken.

This motion is supported by the *Memorandum in Support of Motions to Strike the Affidavits of Roger Smith, Frank Vandersloot, and Joshua Chandler.*

DATED this 7th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

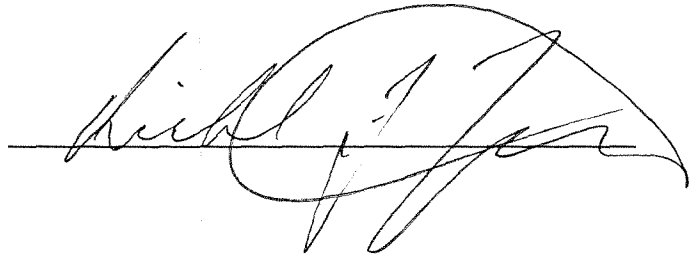
I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing ***MOTION TO STRIKE AFFIDAVIT OF ROGER SMITH*** to the following:

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Joshua K. Chandler
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Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard R. Friess", is written over a horizontal line.

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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

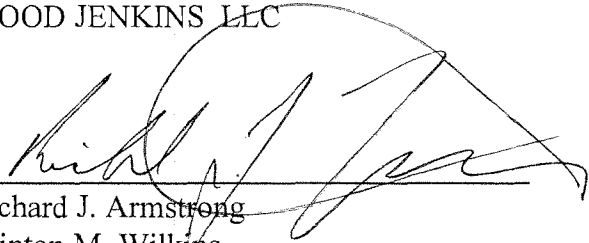
MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>MOTION TO STRIKE AFFIDAVIT OF</i>
	)	<i>JOSHUA CHANDLER</i>
vs.)	
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	Judge Jon J. Shindurling
Defendants.)	
)	

Defendants Rick and Natalie Foeller, by and through their counsel of record, hereby move the Court for an order striking the “*Affidavit of Joshua Chandler in Support of Plaintiff’s Motion for Reconsideration.*” The grounds for this motion include irrelevant testimony in various paragraphs, irrelevant exhibits, lack of foundation, hearsay, and testimony that is speculative and assumes facts not in evidence. Specifically, Defendants move to strike paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of Mr. Chandler’s Affidavit, and Exhibits A, B, D, E, F, G, and H to Mr. Chandler’s Affidavit.

This motion is supported by the *Memorandum in Support of Motions to Strike the Affidavits of Roger Smith, Frank Vandersloot, and Joshua Chandler.*

DATED this 7th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

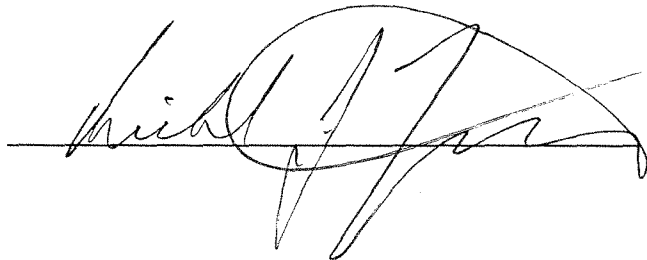
I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing ***MOTION TO STRIKE AFFIDAVIT OF JOSHUA CHANDLER*** to the following:

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Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard R. Friess", is written over a horizontal line.

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BONNEVILLE COUNTY
IDHO
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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

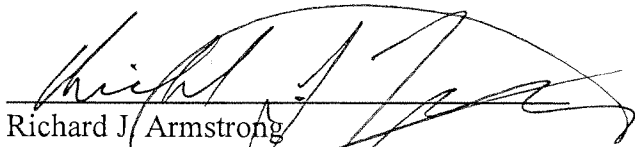
MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>MOTION TO STRIKE AFFIDAVIT OF</i>
	)	<i>FRANK VANDERSLOOT</i>
vs.)	
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	Judge Jon J. Shindurling
Defendants.)	

Defendants Rick and Natalie Foeller, by and through their counsel of record, hereby move the Court for an order striking the “*Affidavit of Frank L. Vandersloot in Support of Plaintiff’s Motion for Reconsideration.*” The grounds for this motion include irrelevant testimony in various paragraphs, lack of foundation, and testimony that is speculative and assumes facts not in evidence. Specifically, Defendants move to strike paragraphs 4, 5, 6, 8, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 of Mr. Vandersloot’s Affidavit.

This motion is supported by the *Memorandum in Support of Motions to Strike the Affidavits of Roger Smith, Frank Vandersloot and Joshua Chandler.*

DATED this 7th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing **MOTION TO STRIKE AFFIDAVIT OF FRANK VANDERSLOOT** to the following:

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Attorneys for Plaintiff Melaleuca, Inc.

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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,

Plaintiff,

vs.

RICK FOELLER and NATALIE
 FOELLER,

Defendants.

***MEMORANDUM IN SUPPORT OF
 MOTIONS TO STRIKE AFFIDAVITS
 OF ROGER SMITH, FRANK
 VANDERSLOOT, AND JOSHUA
 CHANDLER***

Civil No. CV-09-2616

Judge Jon J. Shindurling

ARGUMENT

Plaintiff has submitted three affidavits in support of its motion for reconsideration of its earlier motion for summary judgment. These affidavits are signed by Roger Smith, Plaintiff's expert witness, Frank L. Vandersloot, Plaintiff's Chief Executive Officer, and Joshua Chandler, Plaintiff's Associate General Counsel. For the reasons discussed below, these affidavits should be stricken and disregarded by the Court for purposes of Plaintiff's motion for reconsideration.

A. *The Affidavit of Roger Smith*

The Court should strike the entire affidavit of Mr. Smith, and exclude Mr. Smith from testifying here and at trial. Mr. Smith's testimony in paragraphs 4-6 is without foundation, assumes facts not in evidence, is speculative, and irrelevant. Mr. Smith's alleged analysis of damages in the Max case, referenced in paragraphs 4 and 5 of his affidavit, is irrelevant. Importantly, Defendants requested production of all expert reports and damages analyses by experts in the Max case, as well as in this case, and Plaintiff objected to producing this information in the Max case because Plaintiff claimed it was irrelevant to this case. *See Plaintiff's Answers to Defendants' Third Set of Interrogatories and Fourth Requests for Production*, attached as Exhibit A to the Affidavit of Richard J. Armstrong, filed herewith. Answering Defendants' Interrogatory Nos. 2 and 3, where Defendants requested information relating to any experts designated or where Plaintiff intended to designate an expert witness, Plaintiff stated as follows: "To the extent the interrogatory seeks information regarding experts Plaintiff has retained or intends to retain in actions separate from the present one, *the information sought is irrelevant and is also protected under I.R.C.P. 26(b)(4) and 26(b)(4)(B).*" *See id.* (Emphasis added).

Any testimony from Mr. Smith should be excluded, not only from consideration of Plaintiff's current motion, but at trial. Plaintiff never disclosed any opinion testimony of Mr. Smith during the discovery phase of this case, despite promising in its discovery responses that such evidence was going to be produced by the expert and fact discovery cut-off dates. Plaintiff has failed to disclose *any* evidence from Mr. Smith pertaining to any alleged analysis of damages

in this case, or in the Max case. Therefore, Mr. Smith's affidavit should be stricken in its entirety.

B. The Affidavit of Frank L. Vandersloot

Mr. Vandersloot's affidavit is rife with speculation, hearsay, and irrelevant testimony. Moreover, portions of Mr. Vandersloot's testimony refers to damages that have never been disclosed in discovery.

Paragraph 4: This paragraph should be stricken as irrelevant, assumes facts not in evidence, speculative, and without foundation. Reference is made generally to other MLM companies, without any specific reference to Defendants.

Paragraph 5: This paragraph should be stricken as being irrelevant, assumes facts not in evidence, speculative, and without foundation. There is no evidence in this record regarding "tremendous damage to the lives and businesses of dozens, hundreds, or even thousands of individuals."

Paragraph 6: This paragraph should be stricken as being irrelevant, assumes facts not in evidence, speculative, and without foundation. There is no evidence in this record regarding any influence being used to "manipulate or coerce persons to make decisions that they would not normally have made except for wanting to salvage [personal] relationships." There is also no evidence in this record to support the other statements in paragraph 6. Therefore, this paragraph is irrelevant.

Paragraph 8: This paragraph should be stricken as being irrelevant and containing hearsay.

Paragraph 11: This paragraph should be stricken as referencing hearsay records in two unrelated cases, which are also irrelevant to the issues in this case. This paragraph also lacks proper foundation. The two referenced cases had nothing to do with this Court's analysis and decision regarding Policy 20 containing an unlawful penalty provision.

Paragraph 12: This paragraph should be stricken because it lacks foundation, assumes facts not in evidence, and is a broad statement with no support showing amounts expended.

Paragraph 14: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing that the referenced amount was paid to Defendants for motivating, training, and leading their downline, and fails to show how Mr. Vandersloot knows this information. As a result, this paragraph contains hearsay.

Paragraph 15: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing that the referenced amount was paid to Defendants for building, training, and motivating their organization, and fails to show how Mr. Vandersloot knows this information. As a result, this paragraph contains hearsay.

Paragraph 16: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information. As a result, this paragraph contains hearsay.

Paragraph 17: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay.

Paragraph 18: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay. Moreover, this paragraph references a fact that is supposedly “well documented,” but fails to supply the documents, thereby making this statement hearsay and without proper foundation.

Paragraph 19: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay. This paragraph also references “millions of dollars,” without laying any foundation as to how Mr. Vandersloot knows this information.

Paragraph 20: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay.

Paragraph 21: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay.

Paragraph 22: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay.

Paragraph 23: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay. This paragraph also

states a legal conclusion, without Mr. Vandersloot stating the foundation for such a legal conclusion. This paragraph also constitutes speculation.

Paragraph 24: This paragraph should be stricken because it lacks foundation, assumes facts not in evidence, is speculative, and contains hearsay. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay and speculation.

Paragraph 25: This paragraph should be stricken because it lacks foundation and assumes facts not in evidence. There is no evidence in the record showing how Mr. Vandersloot knows this information, and as a result, this paragraph contains hearsay.

C. The Affidavit of Joshua Chandler

Mr. Chandler's affidavit should be stricken to the extent it references any information related to the *Jordan*, *Blood*, and *Max* cases. It should also be stricken to the extent it is rife with hearsay, speculation, and irrelevant testimony. The *Jordan*, *Blood*, and *Max* references and documents attached to Mr. Chandler's affidavit are irrelevant to the issues in this case. That information also constitutes hearsay, and they have not been properly authenticated by counsel.

Paragraph 3: This paragraph should be stricken as irrelevant. What has happened in other cases is irrelevant to the issues presented here.

Paragraph 4: This paragraph should be stricken as containing and referencing hearsay, and containing irrelevant information. The *Blood* and *Jordan* Decisions are irrelevant and have not been properly authenticated by counsel.

Paragraphs 5-12: These paragraphs should be stricken as containing Plaintiff's factual basis for its damages, which has never been disclosed to Defendants in response to discovery requests seeking Plaintiff's disclosure of its damages and the basis for such.

Paragraph 13: This paragraph should be stricken as irrelevant, lacks foundation, and contains hearsay. The referenced cases did not include Defendants as parties and did not consist of claims against Defendants.

Paragraph 14: This paragraph should be stricken as irrelevant, lacks foundation, and contains hearsay. The referenced cases did not include Defendants as parties and did not consist of claims against Defendants.

Paragraph 15: This paragraph should be stricken as irrelevant, lacks foundation, and contains hearsay. Moreover, the referenced Exhibit D is hearsay, irrelevant, and has not been properly authenticated by counsel. Moreover, the referenced paragraph and exhibit involved a case in which Defendants were not a party and did not consist of claims against Defendants.

Paragraph 16: This paragraph should be stricken for lack of foundation, assumes facts not in evidence, and therefore hearsay. There is no foundation showing how Mr. Chandler knows this information. Therefore, this paragraph is hearsay. Moreover, the alleged statements from the Agrens and other business leaders in Canada, as well as the settlement agreement with Max, constitute rank hearsay.

Paragraph 17: This paragraph should be stricken for lack of foundation and hearsay, as well as irrelevant. The referenced Exhibits E and F are hearsay and should also be stricken.

Paragraph 18: This paragraph should be stricken for lack of foundation and hearsay, as well as irrelevant. These records have no tendency to prove or disprove the existence of damages to Melaleuca.

Exhibit A: This exhibit should be stricken as hearsay, irrelevant, and lack of foundation.

Exhibit B: This exhibit should be stricken as hearsay, irrelevant, and lack of foundation.

Exhibit D: This exhibit should be stricken as hearsay, irrelevant, and lack of foundation.

Exhibit E: This exhibit should be stricken as hearsay, irrelevant, and lack of foundation.

Exhibit F: This exhibit, and its attached exhibits, should be stricken as hearsay, irrelevant, and lack of foundation. This declaration is also governed by a protective order in the referenced federal case where the Court specifically ordered that documents produced in that case are to only be used in conjunction with that case. A true and correct copy of this protective order is attached as Exhibit B to the Affidavit of Richard J. Armstrong filed contemporaneously herewith. In paragraph 2.1 of that Order, the federal court ordered that “[e]xcept as the parties may otherwise agree, or the Court may order, ***Material produced***, whether or not designated CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY, including any report, excerpt, analysis, summary, or description of it, ***shall be used solely for the prosecution or defense of the above-captioned action***, including appeals.” See *id.*, at ¶ 2.1, at 4 (emphasis added).

Exhibit G: This exhibit should be stricken as irrelevant to the issue of damages and the amount of those damages. Moreover, Plaintiff has not properly authenticated this exhibit, as it fails to contain the reporter's certificate. *See* Idaho R. Civ. P. 56(e) ("*Sworn or certified copies* of all papers or parts . . . referred to in an affidavit shall be attached thereto or served therewith.").

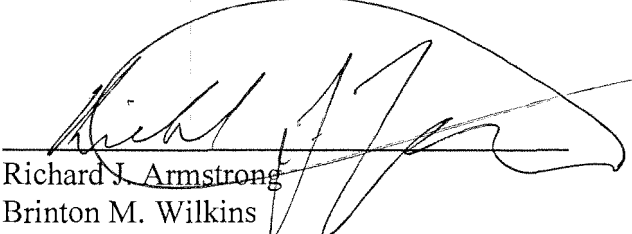
Exhibit H: This exhibit should be stricken as irrelevant to the issue of damages and the amount of those damages.

CONCLUSION

For the foregoing reasons, this Court should strike the referenced paragraphs and exhibits in the affidavits of Messrs. Smith, Vandersloot, and Chandler.

DATED this 7th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

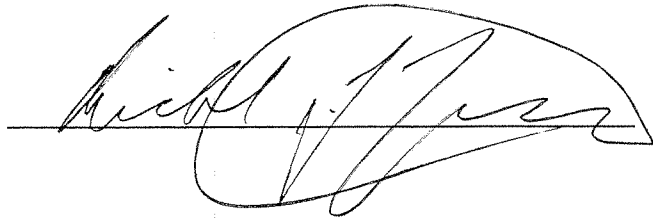
I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing ***MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS TO STRIKE THE AFFIDAVITS OF ROGER SMITH, FRANK VANDERSLOOT, AND JOSHUA CHANDLER*** to the following:

James R. Holman
Richard R. Friess
THOMSEN STEPHENS LAW OFFICES PLLC
2635 Channing Way
Idaho Falls, Idaho 83404
rfriess@ts-lawoffice.com

Brent Manning
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bmanning@mc2b.com

Joshua K. Chandler
MELALEUCA, INC.
3910 South Yellowstone Highway
Idaho Falls, ID 83402
jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard R. Friess", is written over a horizontal line.

2011 NOV -9 PM 1:46

WOOD JENKINS LLC
Richard J. Armstrong ISBN 5548
Brinton M. Wilkins (admitted *pro hac vice*)
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60 East South Temple
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Telephone: (801) 366-6060
Facsimile: (801) 366-6061
rjarmstrong@woodjenkinslaw.com

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>AFFIDAVIT OF NATALIE FOELLER</i>
)	
vs.)	
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	Judge Jon J. Shindurling
Defendants.)	
)	
)	
)	

STATE OF FLORIDA)
)ss.
COUNTY OF SUMTER)

NATALIE FOELLER, hereby swears and deposes as follows:

1. My name is Natalie Foeller and I am one of the defendants in the above-referenced litigation. I am over 21 years of age and have personal knowledge of the facts herein.
2. I am familiar with my downline organization that existed at Melaleuca

before my husband and I resigned from Melaleuca. I am also familiar with the amounts of commissions paid to me during my time as a marketing executive, and familiar with the basis for those commissions.

3. I have read the affidavit of Frank Vandersloot that is submitted in support of Plaintiff's motion for reconsideration and disagree with various points in his affidavit.

4. In paragraph 12 of his affidavit, Mr. Vandersloot states that "Melaleuca has invested an extensive amount of time, energy, and financial resources totaling millions of dollars into building the business organization that the Foellers were compensated to train, motivate and lead." In point of fact, while Melaleuca provided conventions, trainings and promotions *company-wide*, none of these things were done specifically for my business organization. I do not recall any specific training or seminars that were conducted specifically for my organization. Indeed, I spent thousands of dollars traveling, offering promotions, conducting dinner events, and the like all for the purpose of growing my business organization. When members of my downline business organization attended conventions, they paid out of their own pocket to attend. They, and I, paid for the flight, hotel, and food at those events.

5. In paragraph 14 of his affidavit, Mr. Vandersloot states: "[T]here is substantial evidence that the Foellers had never met and had never talked with many of the persons they were being compensated to motivate, train and lead." This is false. In fact, I was more closely connected to the organization than most would be and constantly provided support and presentations as evidenced by the leadership points I earned consistently month after month. It is also the nature of the business that it grows by a marketing executive's efforts and the efforts of those who the marketing executive has trained. I earned on average more leadership points

than others, which shows I did more meetings and presentations than the average marketing executive.

6. In paragraph 15, Mr. Vandersloot states: “[S]ince the Foellers enrolled with Melaleuca in 1999, Melaleuca has paid them more than \$1.7 million to build, train, and motivate her business organization.” This is false. The \$1.7 million was directly related to commissions on product purchased by my organization. Aside from bonuses earned by growing the organization, all income earned was from commissions for product that my organization purchased. For example, for the month of September 2008, the last month I received compensation, my organization produced 67,089 points. This equates to at least \$140,000 paid to Melaleuca for product by my organization. From these purchases, I received \$167.40 for “pool” money, \$1,200 for a car allowance, and \$6,312.83 for commissions on my organization.

7. In paragraph 22, Mr. Vandersloot states: “In summary, the compensation received by the Foellers was in return for training and leadership activities expended by the Foellers.” This is not true. The checks paid to me in July, August, and September 2008 were in the following amounts:

<u>MONTH</u>	<u>AMOUNT</u>
July 2008	\$6,711.55
August 2008	\$7,538.99
September 2008	\$7,612.17
TOTAL	\$21,862.71

8. These amounts are found in monthly summary reports produced by

Melaleuca in this case. These documents were provided to me on a regular basis during the time I was a marketing executive at Melaleuca. Copies of these documents are attached hereto as Exhibit 1.

9. Each of these three pages lists and identifies all items of compensation paid to me by Melaleuca for the months of July, August, and September 2008. In the first page, every item listed in the summary refers to commissions for the sale of products or services. The "Organization Commission" refers to the commission paid for the sale and purchase of products within my downline organization. There is also a "Career/Value Pack Commission," a "Services Bonus," and a "VFL.com Bonus." The "VFL.com Bonus" refers to "Vitality for Life," which relates to the sale of a specific health and fitness program. Each of these items refers to the sale of products and/or services by my downline organization and the corresponding amount of the compensation tied to that item of compensation. Importantly, none of these items on the first page refers to compensation for training or leadership activities.

10. The second and third pages in Exhibit 1 relate to the *Commission and Bonus Summary* for the months of August and September 2008, and are similar to the first page. These pages contain different entries to the first page by referring to an "Executive Director Car Bonus," and an "Executive Director Pool" bonus. The "Executive Director Pool" bonus is the only item of compensation on these sheets that relates to my leadership activities within Melaleuca. The car bonus is provided to marketing executives that have achieved a sales volume of 50,000 with ten (10) personal directors. Whether I grew, did not grow, trained, or did not train, I earned this car allowance month after month as a result of my team's sale of products, not because of training, supporting, or motivating my downline.

11. As shown in the July 2008 *Commission and Bonus Summary*, the entire check in July 2008 was for commissions on product and services purchased and sold within my business organization. *See Ex. 1, hereto.*

12. As shown in the August 2008 *Commission and Bonus Summary*, out of the \$7,538.99 paid to me, \$7,483.55 of this amount was based entirely on commissions on product and services purchased and sold within my business organization. *See Ex. 1, hereto.*

13. As shown in the September 2008 *Commission and Bonus Summary*, out of the \$7,612.17 paid to me, \$7,444.77 of this amount was based entirely on commissions on product and services purchased and sold within my business organization. *See Ex. 1, hereto.*

14. In sum, if any amounts were paid to me for leadership activities for the months of July, August, and September 2008, such amount only totaled \$222.84. *See Ex. 1, hereto.*

15. Contrary to what Melaleuca tries to claim in paragraph 24 of Mr. Vandersloot's affidavit, I trained and supported my downline organization up until the time I resigned my marketing executive position with Melaleuca on November 13, 2008. Therefore, I earned all amounts paid to and received by me for training, support, and leadership activities.

16. Prior to that date, I trained and supported by downline organization. Despite this fact, Melaleuca refused and has continued to refuse to pay me my check for October 2008, totaling \$7,968.

17. Like the other checks, most if not all of this amount related to the purchase and sale of product and services within my business organization, and not training, supporting, motivating, or leading my organization.

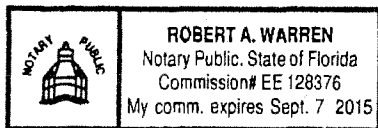
18. Therefore, contrary to Mr. Vandersloot's affidavit, the compensation paid to me in the last three months was almost exclusively for commissions earned on actual product bought and sold by my organization, and not for training, motivating, or leadership activities. The relatively small amounts paid to me for that time period for training, motivating, or leadership activities were earned by me as a result of my performance of those duties.

DATED this 7th day of November, 2011.



NATALIE FOELLER

SIGNED AND SWORN before me this 7th day of November, 2011.





NOTARY PUBLIC

SAWPDATAPLEADING\FOELLER.MELALEUCA.AFFIDAVIT OF NATALIE FOELLER.MOTION RECONSIDERATION.wpd

REPORT DATE 08/13/2008
MONTH END DATE 07/31/2008
Natalie or Rick Foeller

MELALEUCA OF CANADA INC
DATA PROCESSING SERVICE
JULY BUSINESS REPORT

PAGE 57

***** COMMISSION AND BONUS SUMMARY *****

	AVAILABLE	%	EARNED
SCHEDULE I PRODUCT INTRODUCTION COMMISSION	60.96	100%	60.96
SCHEDULE II ORGANIZATION COMMISSION	6,587.88	100%	6,587.88
SCHEDULE VII CAREER/VALUE PACK COMMISSION	96.00	NA	96.00
SCHEDULE IX RETRACTIONS	-61.24	NA	-61.24
SERVICES BONUS	8.30	100%	8.30
VFL.COM BONUS	19.65	NA	19.65
TOTAL COMMISSION AND BONUS EARNED			6,711.55*

*CURRENCY CONVERSION OF 1.2

REPORT DATE 09/12/2008
 MONTH END DATE 08/31/2008
 Natalie or Rick Foeller

MELALEUCA OF CANADA INC
 DATA PROCESSING SERVICE
 AUGUST BUSINESS REPORT

PAGE 55

***** COMMISSION AND BONUS SUMMARY *****

		AVAILABLE	%	EARNED
		-----		-----
SCHEDULE I	PRODUCT INTRODUCTION COMMISSION	0.00	100%	0.00
SCHEDULE II	ORGANIZATION COMMISSION	6,329.99	100%	6,329.99
SCHEDULE VI	EXECUTIVE DIRECTOR POOL I	55.44	100%	55.44
SCHEDULE IX	RETRACTIONS	-77.50	NA	-77.50
	SERVICES BONUS	11.41	100%	11.41
	VFL.COM BONUS	19.65	NA	19.65
	EXECUTIVE DIRECTOR CAR BONUS	1,200.00	100%	1,200.00

	TOTAL COMMISSION AND BONUS EARNED			7,538.99*

*CURRENCY CONVERSION OF 1.2

REPORT DATE 10/12/2008
 MONTH END DATE 09/30/2008
 Natalie or Rick Foeller

MELALEUCA OF CANADA INC
 DATA PROCESSING SERVICE
 SEPTEMBER BUSINESS REPORT

PAGE 54

***** COMMISSION AND BONUS SUMMARY *****

	AVAILABLE	%	EARNED
SCHEDULE I PRODUCT INTRODUCTION COMMISSION	33.60	100%	33.60
SCHEDULE II ORGANIZATION COMMISSION	6,133.55	100%	6,133.55
SCHEDULE VI EXECUTIVE DIRECTOR POOL I	167.40	100%	167.40
SCHEDULE VII CAREER/VALUE PACK COMMISSION	120.00	NA	120.00
SCHEDULE IX RETRACTIONS	-68.06	NA	-68.06
SERVICES BONUS	6.03	100%	6.03
VFL.COM BONUS	19.65	NA	19.65
EXECUTIVE DIRECTOR CAR BONUS	1,200.00	100%	1,200.00
TOTAL COMMISSION AND BONUS EARNED			7,612.17*

*CURRENCY CONVERSION OF 1.2

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
	)	AFFIDAVIT OF RICHARD J.
Plaintiff,	)	ARMSTRONG IN SUPPORT OF
	)	MOTIONS TO STRIKE AFFIDAVITS
vs.	)	OF ROGER SMITH, FRANK
	)	VANDERSLOOT, AND JOSHUA
	)	CHANDLER
RICK FOELLER and NATALIE)	
FOELLER,)	
	)	Civil No. CV-09-2616
Defendants.)	
	)	Judge Jon J. Shindurling

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

RICHARD J. ARMSTRONG, being first duly sworn, deposes and says:

1. I am over the age of 18 years old and am competent to testify to the matters stated herein.

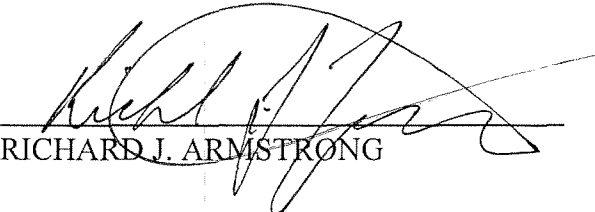
2. I am an attorney for Defendants Rick Foeller and Natalie Foeller in the above-captioned case.

3. Attached hereto as Exhibit A is a true and correct copy of *Plaintiff's Answers to Defendants' Third Set of Interrogatories and Fourth Requests for Production*.

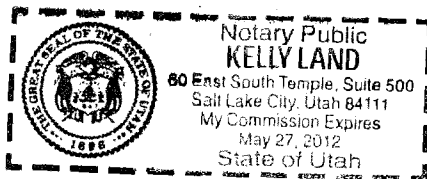
4. Attached hereto as Exhibit B is a true and correct copy of a *Protective Order* in *Melaleuca, Inc. v. Max International*, Case Number 4:09-cv-572-WFD.

5. Defendants respectfully request that the Court take judicial notice of the above-referenced and the attached *Protective Order* pursuant to Idaho R. Evid. 201(c).

DATED this 7th day of November, 2011.


RICHARD J. ARMSTRONG

SUBSCRIBED AND SWORN TO before me this 7th day of November, 2011.




NOTARY PUBLIC

**AFFIDAVIT OF
RICHARD J. ARMSTRONG**

CERTIFICATE OF SERVICE

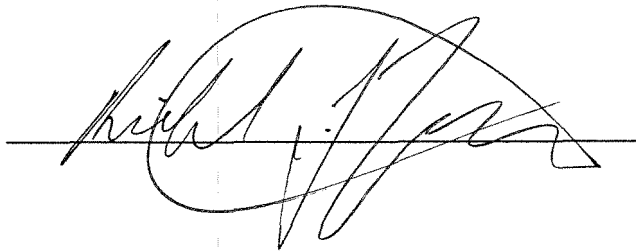
I HEREBY CERTIFY that on the 7th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing ***AFFIDAVIT OF RICHARD J. ARMSTRONG IN SUPPORT OF MOTIONS TO STRIKE THE AFFIDAVITS OF ROGER SMITH, FRANK VANDERSLOOT, AND JOSHUA CHANDLER*** to the following:

James R. Holman
Richard R. Friess
THOMSEN STEPHENS LAW OFFICES PLLC
2635 Channing Way
Idaho Falls, Idaho 83404
rfriess@ts-lawoffice.com

Brent Manning
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170 South Main Street, Suite 900
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bmanning@mc2b.com

Joshua K. Chandler
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3910 South Yellowstone Highway
Idaho Falls, ID 83402
jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.

A handwritten signature in black ink, appearing to read "Richard J. Armstrong", is written over a horizontal line.

SA\WPDATA\PLEADING\FOELLER.MELALEUCA.ARMSTRONG AFFIDAVIT-MOTION TO STRIKE.wpd

***AFFIDAVIT OF
RICHARD J. ARMSTRONG***

10704-10 P104

James D. Holman, Esq., ISB #2547
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Telephone (208) 522-0700
Fax (208) 534-2063/522-1277

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
)
Plaintiff,)
)
v.)
)
RICK AND NATALIE FOELLER,)
individuals,)
)
Defendants.)
_____)

Case No. CV-09-2616

PLAINTIFF'S ANSWERS TO
DEFENDANTS' THIRD SET OF
INTERROGATORIES AND FOURTH
REQUESTS FOR PRODUCTION

Plaintiff Melaleuca, Inc. answers the Defendants' Third Set of Interrogatories and Fourth Requests for Production as follows:

GENERAL OBJECTIONS

1. Plaintiff generally objects to the Requests to the extent that they demand that Plaintiff respond in a manner inconsistent with the requirements of the Idaho Rules of Civil Procedure.

2. Plaintiff generally objects to Defendants's "Instructions" and "Definitions" to the extent they are in any way inconsistent with the requirements of the Idaho Rules of Civil Procedure.

3. Plaintiff generally objects to the Requests to the extent that they seek to compel disclosure of confidential and/or privileged information under the attorney/client privilege, information which is non-discoverable under the attorney work product doctrine, i.e., information prepared in anticipated of litigation or this proceeding, or containing the mental impressions, conclusions, opinions or legal theories of any attorney or other legal or investigative representative of Plaintiff, or other applicable privileges, laws or doctrines which prohibit or otherwise limit discovery, or information which has been gathered or prepared in anticipation of or in connection with litigation. To the extent that the Requests can be construed to seek such information, Plaintiff objects to those requests and will provide only non-privileged and non-immune information.

4. Plaintiff generally objects to the Requests to the extent that they seek to compel the production or disclosure of information not relevant to the subject matter involved in this action and not reasonably calculated to lead to the discovery of relevant and/or admissible evidence. By providing any of the information requested, Plaintiff does not concede the relevance thereof to the subject matter of this litigation.

5. Plaintiff generally objects to the Requests to the extent that they are indefinite, vague,

ambiguous, overly broad or duplicative.

6. Plaintiff objects to the Requests to the extent they are unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy and the issues at stake in the litigation. Plaintiff is willing, however, to confer with Defendants to resolve any disagreements between the parties relating to the scope, breadth and relevance of Defendants' discovery requests.

7. Plaintiff objects to the Requests to the extent they seek information already known to Defendants or available to Defendants from documents in their own files or from public sources.

8. Plaintiff objects to the Requests to the extent they call for a legal conclusion. Plaintiff's responses shall not be construed as providing a legal conclusion concerning the meaning or application of any term(s) or phrase(s) used in the Requests.

9. Plaintiff objects to the Requests to the extent they seek information that is not within the possession, custody or control of Plaintiff.

10. Any response to the Requests indicating that documents have been or will be produced is not to be construed as an admission that documents responsive to the specific Request actually exist.

Plaintiff incorporates each of the foregoing objections into its response to each individual request as though fully set forth therein.

THIRD SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the specific dollar amount of damages you claim were caused by Defendants' alleged violations of Policy 20.

ANSWER: Plaintiff is in the process of determining the amount of damages caused by Defendants' alleged violations of Policy 20 and will seasonably supplement this answer when the

determination is made.

INTERROGATORY NO. 2: State the name, address, and telephone number of any experts you have designated or intend to designate to testify on Melaleuca's behalf regarding any damages in any currently pending litigation or arbitration where at least one of the claims involves allegations of Policy 20 violations and/or unlawful recruiting of Melaleuca's marketing executives.

ANSWER: Plaintiff objects to this interrogatory. To the extent the interrogatory seeks information regarding experts Plaintiff has retained or intends to retain in actions separate from the present one, the information sought is irrelevant and is also protected under I.R.C.P. 26(b)(4) and 26(b)(4)(B).

INTERROGATORY NO. 3: In relation to any currently pending litigation or arbitration, state the name of the case, case number, and court where you have designated or intend to designate an expert witness to testify on your behalf relating to the issues of damages arising from alleged violations of Policy 20 and/or unlawful recruiting of Melaleuca's marketing executives.

ANSWER: Plaintiff objects to this interrogatory. To the extent the interrogatory seeks information regarding experts Plaintiff has retained or intends to retain in actions separate from the present one, the information sought is irrelevant and is also protected under I.R.C.P. 26(b)(4) and 26(b)(4)(B).

INTERROGATORY NO. 4: In relation to this case, state the name, address, and telephone number of each expert witness you intend to designate pursuant to Idaho R. Civ. P. 26(b)(4).

ANSWER: Plaintiff will provide this information in accordance with the expert witness disclosure cutoff date set forth in the Court's January 25, 2011 Scheduling Order.

FOURTH REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1: Please produce all expert reports that have been prepared in relation to

the experts and/or matters identified in Interrogatory Nos. 2-4 above.

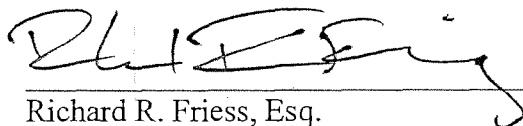
RESPONSE: With respect to Interrogatories Nos. 2-3, see Plaintiff's Answers to the respective interrogatories. With respect to Interrogatory No. 4, Plaintiff will provide this information in accordance with the expert witness disclosure cutoff date in the Court's January 25, 2011 Scheduling Order.

REQUEST NO. 2: Please produce any and all correspondence, including e-mails and other correspondence, between Melaleuca on one hand and the expert(s) identified in Interrogatory No. 4 above on the other.

RESPONSE: Plaintiff objects on the basis that the Request seeks information outside I.R.C.P. 26(b)(1) and on the basis that the information sought is subject to the attorney client and/or work product privilege. Without waiving said objection, see Answer to Interrogatory No. 4.

DATED this 22 day of February, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: 
Richard R. Friess, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 22 day of February, 2011, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

RICHARD J. ARMSTRONG, ESQ
500 EAGLE GATE TOWER
SALT LAKE CITY, UT 84111
FAX: (801) 366-6061

☒ Mail
☐ Hand Delivery
☐ Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By: 

Richard R. Friess, Esq.

CRT:RRF:skp
4550-021\028 ANS 3RD INT & 4TH REQ.wpd

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MELALEUCA, INC., an Idaho
corporation,

Plaintiff,

v.

MAX INTERNATIONAL, LLC, a
Utah limited liability company, KEN
DUNN, an individual, DOES 1
through 25 and DOES 26 through 50,

Defendants.

Case No. 4:09-cv-572-WFD

PROTECTIVE ORDER

Before the Court is Plaintiff's Motion for Entry of Protective Order. (Dkt. No. 81). Having previously set this matter on an expedited basis (Dkt. No. 83), and in the interests of avoiding further delay, the Court will resolve this matter on the briefing and the record without oral argument. After reviewing the record, including both parties' briefing and proposed protective orders, and otherwise being fully informed, the Court finds that Plaintiff's Proposed Protective Order (Dkt. No. 81-1) sufficiently protects the interests of

the parties and is consistent with Rule 26 of the Federal Rules of Civil Procedure.¹

Pursuant to Federal Rule of Civil Procedure 26(c), Plaintiff's motion is GRANTED, and the Court hereby enters the following Protective Order to apply to documents and information produced or disclosed in this case:

1. DEFINITIONS

1.1 "Material" refers to any document, data compilation, testimony, report, interrogatory response, response to a request for admission, response to a request for production, or other information in any form produced or disclosed in this action (including copies), whether voluntarily or through any means of discovery authorized by law, and whether by a party or non-party.

1.2 Material may be designated "CONFIDENTIAL" if the Designating Party in good faith believes that disclosure of such Material in this case without the designation presents a risk of injury to the legitimate business interests of the Disclosing Party or any other legitimate interest. Confidential information includes, but is not limited to, trade secrets (as trade secrets are defined by the Idaho Trade Secrets Act, Idaho Code §§ 48-801, *et seq.* and

¹ This Order should not be construed as limiting the parties from filing a proposed stipulated protective order and seeking modification of the present order.

the Utah Uniform Trade Secrets Act, Utah Code Ann. §§ 13-24-1, *et seq.*), all Materials reflecting, referring to or evidencing any information deemed confidential by any local, state, or federal statute, ordinance, regulation, or other law, business plans or forecasts, financial plans and forecasts, operational plans and forecasts, and all private or sensitive commercial, financial, personal or personnel, underwriting, rating, claims and insurance policy information. Confidential information may take the form of, but is not limited to, (a) documents, responses to request for production, interrogatory responses, or responses to requests for admissions; (b) hearing or deposition transcripts and related exhibits; and (c) all copies, abstracts, excerpts, analyses, reports, and complete or partial summaries prepared from or containing, reflecting, or disclosing such confidential information.

- 1.3 A party may also designate Material as “OUTSIDE COUNSEL EYES ONLY.” OUTSIDE COUNSEL EYES ONLY Material must meet the CONFIDENTIAL designation requirements of Section 1.2 and must be so proprietary or competitively sensitive that its disclosure to persons other than those enumerated in Section 4.1.7 below could cause irreparable competitive or other injury to one of the Parties or to a competitor of one of the Parties (for instance, by giving one of the Parties a competitive advantage).

- 1.4 “Disclosing Party” refers to a party, or non-party, to this action who produces Material.
- 1.5 “Designating Party” refers to a party or non-party to this action who designates Material as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY.
- 1.6 “Requesting Party” refers to a party who has made a discovery request.
- 1.7 “Receiving Party” refers to a party who receives, or is otherwise exposed to, Material during the course of this action.

2. SCOPE OF PROTECTIVE ORDER

- 2.1 Except as the parties may otherwise agree, or the Court may order, Material produced, whether or not designated CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY, including any report, excerpt, analysis, summary, or description of it, shall be used solely for the prosecution or defense of the above-captioned action, including appeals. If CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY Materials are used in the above-captioned action they must be used without violation of this Protective Order.
- 2.2 This Order shall govern all Material produced in this action, including Material produced prior to entry of this Order.

2.3 The protections of this Order shall not apply to Material that, prior to disclosure in this action, was within the actual possession or knowledge of a Receiving Party but was not subject to any confidentiality obligation between the Parties, was previously disclosed by a Disclosing Party to a non-party to this action without any obligation of confidentiality, or was actually public knowledge, provided that the Material did not become public knowledge through an act or omission of a Receiving Party. However, Material that was in the hands of the Receiving Party prior to disclosure in this action and that was subject to a confidentiality obligation between the Parties shall be made subject to this Order. Any party who claims that the Material was, prior to disclosure in this action, within its actual possession or knowledge and was not subject to a confidentiality obligation or was public knowledge shall have the burden of proving that fact.

3. DESIGNATION OF MATERIAL

3.1 General Provisions

3.1.1 A Disclosing Party may designate Material as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY only if the Material (1) is CONFIDENTIAL, as defined by Section 1.2, or OUTSIDE

COUNSEL EYES ONLY, as defined by Section 1.3; and (2) is not excluded from the scope of this Order by Section 2.3.

3.1.2 A Disclosing Party's failure to designate Material as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY at the time of production or disclosure of the Material does not waive its right later to designate the Material as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY. After any designation, each Receiving Party shall treat the designated Material as either CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY and subject to the protections of this Order.

3.2 Methods of Designation

3.2.1 A Designating Party may designate Material as CONFIDENTIAL by placing or affixing on the Material the word "CONFIDENTIAL" and/or "SUBJECT TO PROTECTIVE ORDER" or a similar legend.

3.2.2 A Designating Party may designate Material as OUTSIDE COUNSEL EYES ONLY by placing or affixing on the Material the words "OUTSIDE COUNSEL EYES ONLY."

3.2.3 Hearing or deposition transcripts, or portions of such transcripts, may be designated CONFIDENTIAL or OUTSIDE COUNSEL EYES

ONLY by: (a) counsel so stating on the record during the hearing or deposition, or (b) providing written notice to the reporter and all counsel of record within 30 days after the reporter sends notice to counsel that the written transcript is available for review.

3.2.4 When CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY

Material is supplied or stored on a digital, electronic, or electromagnetic medium, the CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY designation shall be made, to the extent physically possible, on the medium itself (such as on a label attached to a disk), on the sleeve, envelope, box, or other container or such medium.

3.3 Challenging Confidentiality Designations

3.3.1 If any Party challenges the confidentiality designation of any
CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY
information the parties shall undertake to resolve the dispute as follows:

(a) the objecting party shall notify the Designating Party in writing
as to its objection(s) to the designations. This notice shall include, at
a minimum, a specific identification of the designated material
objected to as well as the reason(s) for the objection.

(b) The objecting party shall thereafter have the burden of conferring
either in person or by telephone with the Designating Party claiming
protection (as well as any other interested party) in a good faith
effort to resolve the dispute.

(c) Failing agreement, the objecting party may bring a noticed
motion to the Court for a ruling that the Material sought to be
protected is not entitled to such designation. The Designating Party
bears the burden to establish that the Material is CONFIDENTIAL
or OUTSIDE COUNSEL EYES ONLY and entitled to protection
under this Order. Notwithstanding any such challenge to the
designation of Material as CONFIDENTIAL or OUTSIDE
COUNSEL EYES ONLY, all such Material so designated shall be

treated as such and shall be subject to the provisions of this Order until one of the following occurs: (a) the Disclosing Party withdraws such CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY designation in writing, or (b) the Court rules that the designation is not proper and that the designation be removed.

4. DISCLOSURE, USE, AND HANDLING OF CONFIDENTIAL OR OUTSIDE COUNSEL EYES ONLY MATERIAL

4.1 Use and Handling of CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY Material

4.1.1 To the extent any Material filed with the Court, including pleadings, exhibits, transcripts, expert reports, answers to interrogatories, transcripts of hearings or depositions, and responses to requests for admissions, contains or reveals CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY Material, the Material or any portion thereof shall be filed under seal pursuant to the applicable rules.

4.1.2 All copies, duplicates, extracts, summaries, reports, or descriptions (collectively "copies") of Materials designated as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY, or any portion thereof, shall immediately be affixed with the word "CONFIDENTIAL," or

“OUTSIDE COUNSEL EYES ONLY” if such a word does not already appear.

- 4.1.3 Material properly designated as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY shall not be posted on the Internet, or disclosed on any other public broadcast forum, chat room, message board, or the like, except to the limited extent such materials are properly made available for review through an Electronic Case Filing system provided by the Court.
- 4.1.4 Material designated CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY does not lose protected status through an unauthorized disclosure, whether intentional or inadvertent, by a Receiving Party. If such a disclosure occurs, the Parties shall take all steps reasonably required to assure the continued confidentiality of the Material.
- 4.1.5 Material that is subject to a claim of attorney/client privilege or work product protection by the Disclosing Party does not lose its protected status through disclosure to the Receiving Party and disclosure of such Material does not constitute a waiver of a claim of privilege by the Disclosing Party. If Material is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation

material, the party making the claim may notify any party that received the Material of the claim and the basis for it. After being notified, a party must promptly return or sequester the specified Material and any copies it has and may not use or disclose the information until the question of its privileged or protected status is determined. If a Receiving Party challenges the privilege designation, the receiving party must sequester the Material and promptly present the Material to the court under seal for a determination of the asserted privilege claim. If the Receiving Party disclosed the information before being notified, it must take immediate and reasonable steps to retrieve it. The Disclosing Party must preserve the information until the claim is resolved.

4.1.6 Any Material that is designated CONFIDENTIAL shall not be disclosed to any person or entity other than the following, and only after such person or entity has been advised of and is subject to the terms of this Order.

4.1.6.1 The Parties, including in-house counsel, former officers, directors, partners, employees, or agents of a Party required to provide assistance in the conduct of this litigation.

- 4.1.6.2 The Court, its staff, the jury, and all appropriate courts of appellate jurisdiction and their staff in this litigation;
- 4.1.6.3 Outside counsel of record for the Parties in this litigation;
- 4.1.6.4 Members of the legal, paralegal, secretarial or clerical staff of such counsel who are assisting in or responsible for working on this litigation and who have need for such information for purposes of this litigation;
- 4.1.6.5 Outside consultants, investigators, interpreters, translators, or experts of the Parties who have a need for such information to assist in this litigation;
- 4.1.6.6 Court reporters during depositions or hearings in this litigation;
- 4.1.6.7 Deponents during depositions or witnesses during hearings in this litigation;
- 4.1.6.8 Persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to the CONFIDENTIAL Material being disclosed, or who have been participants in a communication that is the subject of the CONFIDENTIAL Material and from

whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated, except that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation;

4.1.6.9 Employees of third-party contractors of the Parties involved solely in providing copying services or litigation support services such as organizing, filing, coding, converting, storing, or retrieving Material connected with this litigation; and

4.1.6.10 Any other person agreed to in writing by the Disclosing Party.

4.1.7 Any Material that is designated OUTSIDE COUNSEL EYES ONLY shall not be disclosed to any person or entity other than the following, and only after such person or entity has been advised of and has agreed to be subject to the terms of this Order:

- 4.1.7.1 The Court, its staff, the jury, and all appropriate courts of appellate jurisdiction and their staff in this litigation;
- 4.1.7.2 Outside counsel of record for the Parties in this litigation;
- 4.1.7.3 Members of the legal, paralegal, secretarial or clerical staff of such outside counsel who are assisting in or responsible for working on this litigation and who have need for such information for purposes of this litigation;
- 4.1.7.4 Experts, interpreters, translators, or consultants retained by any of the Parties who have a need for such information to assist in this litigation;
- 4.1.7.5 Court reporters during depositions or hearings in this litigation;
- 4.1.7.6 Deponents during depositions or witnesses during hearings in this litigation;
- 4.1.7.7 Persons who have had, or whom any counsel for any party in good faith believes to have had, prior access to the OUTSIDE COUNSEL EYES ONLY Material being disclosed, or who have been participants in a communication that is the subject of the OUTSIDE

COUNSEL EYES ONLY Material and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may have participated, except that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation; and

4.1.7.8 Employees of third-party contractors of the Parties involved solely in providing copying services or litigation support services such as organizing, filing, coding, converting, storing, or retrieving Material connected with this litigation.

4.1.8 Prior to disclosure of any CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY Material to any expert employed by the Parties, or counsel for the Parties to assist in the preparation and litigation of this matter, he or she must first be advised of and agree in writing to be bound by the provisions of this Order. Such written

agreement shall consist of his or her endorsement of a copy of this Order or of the Undertaking attached to this Order. Copies of such writings, except as to those persons whose identities need not be disclosed in discovery, shall be produced to other parties upon written request.

4.1.9 The recipient of any CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY material shall maintain such information in a secure and safe area and shall exercise the same standard of due and proper care with respect to the storage, custody, use and/or dissemination of such information as is exercised by the recipient with respect to its own proprietary information.

5. OTHER PROVISIONS

5.1 At the conclusion of this litigation, including any appeals, all Material not received in evidence shall be returned to the Disclosing Party. If the Disclosing Party agrees in writing, the Material may be destroyed.

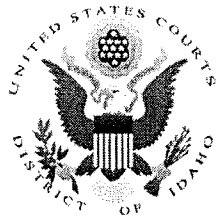
5.2 Any third party producing Materials in this action may be included in this Order by endorsing a copy of this Order and delivering it to the Requesting Party, who, in turn, will serve a copy of it upon counsel for the other parties.

- 5.3 This Order shall not prevent any party from applying to the Court for further or additional confidentiality orders, or from agreeing with the other parties to modify this Order, subject to the approval of the Court.
- 5.4 This Order shall not preclude any party from enforcing its rights against any other party, or any non-party, believed to be violating its rights under this Order.
- 5.5 Except as provided for in this Order, nothing in this Order, nor any actions taken pursuant to this Order, shall be deemed to have the effect of an admission or waiver by any party, including the right of either party to object to the subject matter of any discovery request. Furthermore, nothing in this Order, nor any actions taken pursuant to or under the provisions of this Order shall have the effect of proving, suggesting to prove, or otherwise creating a presumption that information disclosed in this action is confidential, trade secret or proprietary, as it pertains to the parties' respective claims in this action.
- 5.6 After final termination of this litigation, including any appeals, each counsel of record, upon written request made within 60 days of the date of final termination, shall within 60 days of such request, (a) destroy or (b) assemble and return to the counsel of record, all Material in their possession

and control, embodying information designated CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY, including all copies thereof except that each counsel of record may maintain one archive copy of all pleadings, correspondence, deposition transcripts, deposition exhibits, trial transcripts, and trial exhibits, together with any attorney work product provided that such archive copy be appropriately marked as CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY and be retained in accordance with the terms of this Order.

5.7 Counsel for any party may exclude from the room at a deposition, other discovery proceedings, or at a hearing, during any questioning that involves CONFIDENTIAL or OUTSIDE COUNSEL EYES ONLY Material, any person (other than the witness then testifying) who is not permitted the disclosure of such Material under this Order.

5.8 The Parties and any other person subject to the terms of this Protective Order agree that this Court has and retains jurisdiction during and after this action is terminated for the purpose of enforcing this Order. This Order shall survive termination of this litigation, to the extent that the information contained in confidential matters is not or does not become known to the public.



DATED: December 21, 2010

CW Dale

Honorable Candy W. Dale
Chief United States Magistrate Judge

UNDERTAKING

I, _____, have read and agree
to be bound by the Protective Order in *Melaleuca, Inc. v. Max Int'l*, Case No. 4:09-
cv-00572-WFD, filed in the United States District Court for the District of Idaho.

I hereby submit to the jurisdiction of the Court for purposes of ensuring
compliance with the Protective Order.

Date: _____

Signature: _____

Printed
Name: _____

Address: _____

WOOD JENKINS LLC
Richard J. Armstrong ISBN 5548
Brinton M. Wilkins (admitted *pro hac vice*)
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BONNEVILLE COUNTY
IDAHO
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,	)	REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S RULE 56(F) MOTION
Plaintiff,)	
vs.)	
)	
)	
RICK FOELLER and NATALIE FOELLER,	)	(Hearing Date: Monday, November 21, 2011, 9:30 a.m.)
Defendants.	)	Civil No. CV-09-2616
	)	Judge Jon J. Shindurling
)	

ARGUMENT

I. **MELALEUCA HAS NOT PROVEN DAMAGE AND DAMAGE CANNOT
BE PRESUMED IN THIS CASE.**

It is Plaintiff's burden in responding to a motion for summary judgment to demonstrate a genuine dispute of material fact. *See Northwest Rec-Corp v. Home Living Serv.*, 136 Idaho 835, 41 P.3d 263 (2002). Importantly, once the absence of evidence has been established by the moving party that does not have the burden of proof at trial, the burden shifts to the party opposing the motion to establish, via depositions, discovery responses, or affidavits,

that there is indeed a genuine issue for trial. *See Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 876 P.2d 154 (Ct. App. 1994). Stated another way, and in particular reference to Defendants' motion, Plaintiff must point to something in the record which places into genuine dispute the issue of Plaintiff's damages. Plaintiff has failed to do so.

In its opposition, Plaintiff cites to three materials that show a genuine dispute of material fact. Those materials are the affidavits of Josh Chandler, Frank Vandersloot, and Roger Smith. Each of these affidavits, however, are objectionable, because they do not pass evidentiary muster for purposes of defeating Defendants' motion for summary judgment. In this regard, Defendants incorporate by reference their motions to strike the above-referenced affidavits, and the memorandum in support. Suffice to say, Plaintiff has never produced evidence of its damages before the discovery cut-off date, and Plaintiff's affidavits do not create a genuine dispute of material fact in relation to Plaintiff's damages.

Plaintiff's opposition to Defendants' motion for summary judgment is premised on a fundamental misreading of this Court's earlier SJ Decision. There can be no question that this Court meant what it said back in December 2010, *i.e.*, that Plaintiff's Policy 20(c)(1) is an illegal penalty provision *in the absence of proof of actual damage*. *See* SJ Decision, at 7. Therefore, Policy 20(c)(1) cannot form the basis of Plaintiff's claim for damages in this case without there being proof that Plaintiff actually suffered damage. Without evidence of such actual damage, Policy 20(c)(1) is a provision designed to punish and deter a breach of Plaintiff's policies and procedures.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT 2**

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The reason Defendants are entitled to summary judgment in this case is that Plaintiff has not come forward, as signaled by the Court, to present evidence of actual damage caused by Defendants. Without such evidence, Plaintiff should not be allowed to proceed to trial on any claims for relief, including injunctive relief.

Contrary to Plaintiff's argument, damages in this case cannot be presumed and nominal damages would be an inappropriate result. The law is clear. Damages in a breach of contract case, and their amount, "must be proven to a reasonable certainty." *Eliopulos v. Kondo Farms, Inc.*, 102 Idaho 915, 919, 643 P.2d 1085, 1089 (Ct. App. 1982). They cannot be presumed. Stated another way, "the measure of damage – as well as the fact of damage – must be proven *beyond speculation*." *Wing v. Hulet*, 106 Idaho 912, 919, 684 P.2d 314, 321 (Ct. App. 1984), citing *Eliopulos*, 102 Idaho 915.

Plaintiff argues that it is entitled to "nominal damages" even if it cannot show an amount for damage. Plaintiff is wrong. Nominal damages are only appropriate when it is necessary to "symbolically" demonstrate an "infraction of a legal right" relating to a plaintiff's "person or property." See *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004). Under Idaho law, this means that nominal damages are only appropriate when a tort has occurred, such as a battery, or some other legal infraction relating to property, such as trespass, and the plaintiff is otherwise unable to prove an actual dollar amount for its injuries. See, e.g., *Pierson v. Brooks*, 115 Idaho 529, 537, 768 P.2d 792, 800 (Ct. App. 1989) (citing C. MCCORMICK, THE LAW OF DAMAGES, § 20 (1935)). In such instances, Idaho courts have

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT** 3

allowed an award of nominal damages in order to symbolically demonstrate the infraction of the person's legal rights.

Moreover, Plaintiff never alleged nominal damages in its complaint. Plaintiff alleged that the damages in this case exceeded \$10,000, and no allegation is made by Plaintiff in the complaint that it is alternatively entitled to nominal damages. Because Plaintiff has alleged more than nominal damages in its complaint, and has specifically failed to allege nominal damages, Plaintiff has waived its ability to claim nominal damages at trial.

II. PLAINTIFF'S RULE 56(F) MOTION SHOULD BE DENIED.

With its opposition memorandum, Plaintiff has purported to file a "Rule 56(f) motion," arguing that Plaintiff's expert witness, Roger Smith, "needs additional time to prepare a more complete detailed expert report." See Pl's Rule 56(f) Motion, ¶ 2. Plaintiff's motion should be denied.

The Idaho Rules of Civil Procedure do not provide for the filing of a Rule 56(f) "motion" when a party is unable to present by affidavit facts essential to justify the party's opposition to a motion for summary judgment. The procedure in such a situation is to file an *affidavit* stating the specific reasons why it cannot, through affidavit or other evidence, justify the party's opposition to the motion for summary judgment. See Idaho R. Civ. P. 56(f). Rule 56(f) reads:

Should it appear from *the affidavit of a party* opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT** 4

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Idaho R. Civ. P. 56(f) (emphasis added).

Here, Plaintiff has not filed a Rule 56(f) affidavit and on this basis alone, the Court should reject Plaintiff's argument that it needs additional time for Mr. Smith to conduct an expert analysis of the damages in this case. Even if the Court were to treat the motion as a Rule 56(f) affidavit, the request for additional expert discovery should be denied. Plaintiff fails to state or allege any reasons that would justify such an extension of time. There is no allegation or affirmation relating to why Plaintiff could not perform its expert analysis of damages within the time allotted by the Court in the scheduling order. For this additional reason, Plaintiff's Rule 56(f) motion should be denied.

Plaintiff has had more than sufficient time to assess its damages by way of expert assistance. This Court's scheduling order set the deadline for fact discovery for October 10, 2011. Plaintiff designated its expert by the deadline of September 20, 2011, but as already stated in Defendants' motion for summary judgment, Plaintiff has never timely disclosed any expert opinion relating to damages and a figure for damages. Plaintiff has not set forth any testimony, by affidavit or otherwise, as to why Plaintiff could not abide by the Court's scheduling order governing expert disclosures and fact discovery deadlines. It would be unfair and prejudicial to Defendants to allow Plaintiff more time to assess its damages.

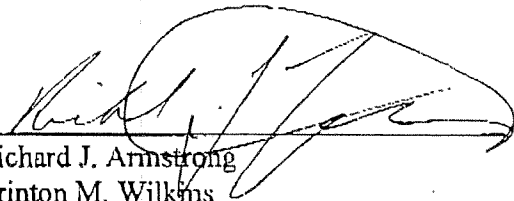
CONCLUSION

For at least the foregoing reasons, and for the reasons set forth in Defendants' opening brief, and motions to strike, Defendants are entitled to summary judgment on all claims asserted by Plaintiff.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT 5**

DATED this 14th day of November, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT 6

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CERTIFICATE OF SERVICE

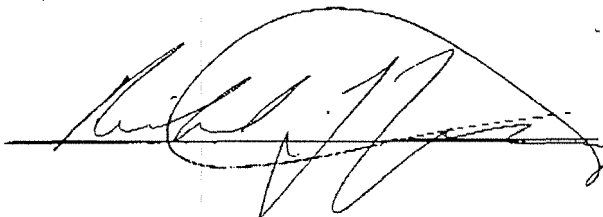
I HEREBY CERTIFY that on the 14th day of November, 2011, I caused to be e-mailed and mailed in the United States mail, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S RULE 56(F) MOTION** to the following:

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Richard R. Friess
THOMSEN STEPHENS LAW OFFICES PLLC
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rfriess@ts-lawoffice.com

Brent Manning
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Joshua K. Chandler
MELALEUCA, INC.
3910 South Yellowstone Highway
Idaho Falls, ID 83402
jchandler@Melaleuca.com

Attorneys for Plaintiff Melaleuca, Inc.



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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT 7**

493

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BONNEVILLE COUNTY, IDAHO
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

MELALEUCA, INC., an Idaho corporation,)
Plaintiff,)
v.)
RICK FOELLER and NATALIE FOELLER,)
Defendants.)

Case No. CV-09-2616

AFFIDAVIT OF RICHARD R. FRIESS
IN SUPPORT OF PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE
AFFIDAVITS

I - AFFIDAVIT OF RICHARD R. FRIESS IN SUPPORT OF PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE
AFFIDAVITS

STATE OF IDAHO)
) ss.
County of Bonneville)

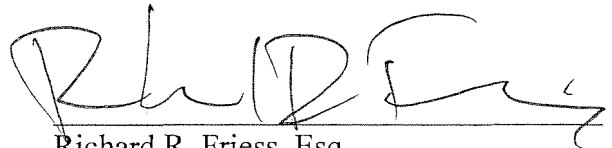
RICHARD R. FRIESS, being first duly sworn upon oath, deposes and says:

1. My name is Richard R. Friess and I make this affidavit from personal knowledge.
I am over the age of 18 and am counsel for record for Plaintiff, Melaleuca, Inc., in the above captioned matter.

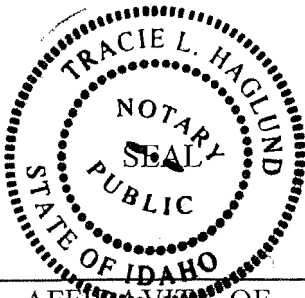
2. Attached hereto as Exhibit A are true and correct copies of defendants' First, Second, and Third Interrogatories and defendants First, Second, Third, and Fourth Request for Production of Documents as referenced in Plaintiff's *Memorandum in Opposition to Defendants' Motion to Strike Affidavits*.

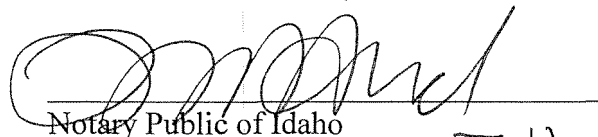
3. Attached hereto as Exhibit B is a true and correct copy the reporters certificate for the February 1, 2010 deposition transcript of Natalie Foeller as referenced in Plaintiff's *Memorandum in Opposition to Defendants' Motion to Strike Affidavits*.

Further your affiant sayeth not.


Richard R. Friess, Esq.

SUBSCRIBED AND SWORN to on oath before me this 14 day of November, 2011




Notary Public of Idaho
Residing at: Idaho Falls, ID
My Commission Expires: 3/15/15

2 - AFFIDAVIT OF RICHARD R. FRIESS IN SUPPORT OF PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE
AFFIDAVITS

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on November 14, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF RICHARD R. FRIESS IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AFFIDAVITS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

RICHARD J. ARMSTRONG
500 EAGLE GATE TOWER
SALT LAKE CITY, UT 84111
FAX: (801) 366-6061

☒ U.S. Mail
☐ Hand Delivery
☒ Facsimile
☐ Courthouse Box

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Richard R. Friess, Esq.

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EXHIBIT A

WOOD CRAPO LLC
Richard J. Armstrong ISBN 5548
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
rjarmstrong@woodcrapo.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>DEFENDANTS' FIRST SET OF</i>
	)	<i>INTERROGATORIES, REQUESTS</i>
vs.	)	<i>FOR PRODUCTION, AND REQUESTS</i>
	)	<i>FOR ADMISSION</i>
)	
RICK FOELLER and NATALIE)	
FOELLER,	)	Civil No. CV-09-2616
)	
Defendants.	)	The Honorable Jon J. Shindurling
)	
)	
)	

Pursuant to Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following First Set of Interrogatories, Requests for Production, and Requests for Admission to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Crapo LLC, 500 Eagle Gate Tower, 60 East South Temple Salt Lake City, Utah 84111.

DEFINITIONS

As used in these Interrogatories and the accompanying Requests for Production of Documents and Things, the terms listed below are defined as follows:

a. The terms "You," "Your," and "Plaintiff," mean Melaleuca, Inc., including any divisions, departments, subsidiaries, parents, affiliates and predecessors, and their respective present or former officers, directors, employees, owners, attorneys and agents, as well as consultants and any other persons acting or purporting to act on behalf of each such entity or person.

b. The term "Defendants" means Rick Foeller and/or Natalie Foeller as well as any other persons acting or purporting to act on their behalf.

c. The terms "person" or "persons" mean any natural person, corporation, partnership, association, organization, or group of natural persons, including but not limited to any employee, officer, director, consultant, independent contractor, agent, attorney or representative of any of them.

d. The words "document" or "documents" shall be used in their broadest sense and shall include, but are not limited to, any tangible thing capable of storing information, including but not limited to the following items, whether printed, typed or recorded or reproduced by hand or electronically, magnetically, optically or in any graphic manner of any kind or nature however produced or reproduced, whether sent or received or neither, whether within the actual or constructive possession, custody, or control of any agent, employee, consultant, or any other person acting or purporting to act on Your behalf, including drafts and copies bearing notations or marks not found on the original:

a. all letters or other forms of correspondence or communication, including envelopes, notes, telefaxes, telegrams, cables, electronic mail messages, telex messages, and telephone messages (including reports, notes, notations and memoranda of or relating to any telephone conversations or conferences or personal interviews);

b. all memoranda, research reports, speeches, reports, financial statements or reports, appraisals, estimates, notes, transcripts, tabulations, ledgers, studies, analyses, evaluations, projections, work papers of any type, corporate records or copies thereof, lists, comparisons, questionnaires, surveys, charts, graphs, maps, diagrams, summaries, tables, indexes, extracts, statistical records, compilations, reports and/or summaries of investigations, testing or analyses, marginal notations, desk calendars, appointment books, diaries, invoice receipts, contracts, insurance policies;

c. all books, manuscripts (whether submitted for publication or not), advertisements (whether submitted for publication or not), press releases, magazines, newspapers, booklets, brochures, training materials, pamphlets, circulars, bulletins, notices, speeches, instructions, manuals, and articles;

d. all minutes, transcripts, notes, presentation material, and memoranda of meetings;

e. all photographs, drawings, microfilms, tapes or other recordings, punch cards, magnetic tapes, magnetic disks, optical or magneto-optical disks, print-

outs, and other data compilations from which information can be obtained, and any other information recorded in or on any medium whatsoever;

f. all contracts, agreements, understandings, representations, warranties; and

g. any and all drafts of the foregoing.

5. Unless otherwise specified herein, "relates to," "relating to," "refers to" and "referring to" shall be used interchangeably to mean concerning, comprising, involving, directed to, created by, sent to, received by, copied to, responsible for, or in any way logically or factually connected to the subject of the request.

6. To "identify" a person means to state the person's name, business address and telephone number and, in the case of a natural person, his home address, current occupation or job title, and current employer or business affiliation and telephone number or, in the case of a business enterprise, its form of organization, its state or country of incorporation if applicable, its address and principal place of business, executive officer or officers and telephone number.

7. To "identify" a document means to provide a brief description of the document sufficient to support a request for production, including the general nature of the subject matter, the date, identification of the author(s), addressee(s) and distributee(s), if any, and, if the document comprises or embodies an agreement, the parties to such agreement. In answer to interrogatories requiring identification of any document or documents, such document or documents may be produced by Plaintiff for inspection and copying along with the answers to these interrogatories in lieu of identification provided, however, the interrogatory or interrogatories to which the document responds must be specified.

8. To “identify” a thing means to provide a brief description of the thing sufficient to support a request for production, including any names, numbers, markings, or other identifying characteristics by which Plaintiff understands the thing to be identified.

9. To “locate” a document or thing means to state, by identifying a complete address, the present whereabouts of the document or thing, and to identify the one or more persons having possession, custody, or control thereof.

10. The words “and”, “and/or”, and “or” shall each be deemed to refer to both their conjunctive and disjunctive meanings. The words “all” and “any” shall mean “each and every” as well as “any one.” The masculine gender shall be deemed to include the feminine and the neuter where appropriate, the singular, the plural, and vice versa.

INSTRUCTIONS

1. These Interrogatories and the accompanying Requests for Production of Documents and Things are of continuing effect, and to the extent that at any time after answering thereof You become aware of or acquire additional information responsive to these Interrogatories and the accompanying Requests for Production of Documents and Things, such information shall be produced promptly.

2. References to natural persons shall be deemed to include, in addition to the person named, his or her agents or assigns, representatives, and attorneys, any partnership of which such person is a member or general partner, and any other business entity in which such person has a controlling direct or indirect interest.

3. References to entities other than natural persons, including Plaintiff, shall be deemed to include, in addition to the entity named, its divisions, departments, subsidiaries, affiliates,

parents, predecessors, present or former officers, directors, employees, agents, representatives, accountants and attorneys, and all other persons acting or purporting to act on behalf of each such entity or person.

4. If any interrogatory or request for documents and/or things cannot be complied with in full, it shall be complied with to the extent possible, with an explanation as to why full compliance is not possible.

5. In the event that any document identified in these interrogatories is subject to any claim of privilege (including work product), Plaintiff shall furnish a list identifying each such document by:

a. identifying the person who prepared or authored the document and, if applicable, the persons who sent the document and to whom the document was sent (including copies) and the dates on which the document was prepared and transmitted;

b. describing the nature of the document (e.g., letter, inter-office memorandum, telegram, notes, etc.) and, to the extent possible, the subject matter thereof;

c. identifying any and all attachments or enclosures appurtenant to such documents;

d. stating briefly the nature of the privilege asserted; and

e. producing any non-privileged portions, attachments or enclosures to any such privileged document, and identifying the portion(s) of the document to which privilege is claimed.

f. When producing any document in machine readable form, Plaintiff will produce the means for reading said machine readable document, including software, hardware and any other equipment or apparatus required for that purpose, or, in the alternative, will provide complainant with a hard copy of said machine readable document.

g. Each copy of any document that contains any markings not appearing on the original, or is an alteration of the original, shall be considered a separate document for purposes of these discovery requests.

h. Records produced should be identified by category, location and form of record as ordinarily maintained in the course of business, and any indexes to such records should also be supplied.

i. Where these Interrogatories call for the identification of a document or thing, it may be satisfied by the production of the document or thing and a statement identifying which of the documents produced is the document or thing in question

j. Responses to these Interrogatories, unless specifically stated, shall cover the period from 1998 to the present.

INTERROGATORIES

INTERROGATORY NO. 1: Identify and describe the nature of any relationship and/or business association between You and Defendants. Be sure to describe in detail the nature of the services/work that Defendants provided to You or on your behalf, as well as a description of the compensation scheme whereby Defendants received payments for services rendered/work performed.

INTERROGATORY NO. 2: Starting in 1998, provide a detailed chronological accounting of all revenue that Defendants generated for You up until their resignation from Melaleuca in November 2008.

INTERROGATORY NO. 3: Describe the annual average value of the services/work that Defendants provided You, providing dollar amounts.

INTERROGATORY NO. 4: Identify and describe the annual average income, revenues and sales You recognized from the geographical area in which Defendants worked.

INTERROGATORY NO. 5: Identify and describe the annual average income, revenues and sales You recognized from the work/services that Defendants provided on your behalf.

INTERROGATORY NO. 6: Identify and describe the income, revenues and sales that You will no longer receive as a result of Defendants' resignation from Melaleuca.

INTERROGATORY NO. 7: Identify all commissions paid to and/or withheld from Defendants since 1998 to the present time, and describe the reasons for any commissions withheld.

INTERROGATORY NO. 8: State the names, addresses, and telephone numbers of your accountant, bookkeeper, and any other persons who possess Your financial records, and state which records each possesses.

INTERROGATORY NO. 9: Identify any financial statement or any list of Your assets and liabilities prepared by You or on Your behalf in the last three years.

INTERROGATORY NO. 10: Identify all witnesses, including experts, that You intend to call at trial, and for each such witness 1) identify the expected subject matter of that person's

testimony and 2) identify all documents and/or things expected to be utilized by such witness in preparation for such testimony.

INTERROGATORY NO. 11: Identify all persons who have knowledge about any of the matters alleged in the complaint in this proceeding.

INTERROGATORY NO. 12: Identify all distributors that You believe Defendants have contacted and/or “raided” in any manner that violates Defendants’ contractual obligations to You.

INTERROGATORY NO. 13: Identify all up-line distributors that sponsored any of the distributors that You believe Defendants have contacted and/or raided in any manner that violates Defendants’ contractual obligations to You.

INTERROGATORY NO. 14: Separately, for each of the foregoing Interrogatories:

a. Identify all documents reviewed, consulted or referred to in anyway by any person in preparing the answer to each Interrogatory, or in supplying information used in preparing such answer; and

b. Identify all persons who were consulted and/or who supplied information used in preparing the answer to each Interrogatory.

REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1: All documents referring or relating to any relationship between You and Defendants.

REQUEST NO. 2: All documents referring or relating to the services/work that Defendants performed for You.

REQUEST NO. 3: All documents referring or relating to Defendants.

REQUEST NO. 4: Your quarterly and annual financial statements from 1998 to the present.

REQUEST NO. 5: Your quarterly and annual profit and loss statements from 1998 to the present.

REQUEST NO. 6: Your annual reports from 1998 to the present.

REQUEST NO. 7: Any and all records/documents relating to, referring to or referencing sales generated/made by Defendants since 1998.

REQUEST NO. 8: Any and all records/documents relating to, referring to or referencing sales made by any Melaleuca employee, affiliate or independent contractor within Ontario, Canada, since 1998.

REQUEST NO. 9: Any and all records/documents that You may have relied upon or referred to when answering Defendants' First Set of Interrogatories.

REQUEST NO. 10: Any and all genealogy reports for all distributors that You believe Defendants have contacted and/or "raided" in violation of Defendants' contractual obligations to Melaleuca.

REQUEST NO. 11: Any and all sales reports since 1998 for all down-line distributors that You believe Defendants have contacted and/or "raided" in violation of Defendants' contractual obligations to Melaleuca.

REQUEST NO. 12: Any and all sales reports since 1998 for all distributors in the up-line of any and all distributors that You believe Defendants have contacted and/or "raided" in violation of Defendants' contractual obligations to Melaleuca.

REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that You can readily obtain Melaleuca's records regarding distributor sales.

Admit _____

Deny _____

REQUEST NO. 2: Admit that Melaleuca's records regarding distributor sales are sufficient to determine the legal damages that Melaleuca may have suffered as a result of Defendants' alleged actions.

Admit _____

Deny _____

REQUEST NO. 3: Assuming that the allegations in Your complaint are correct, which Defendants expressly deny, admit that upon reasonable inquiry the total value of the money damages and/or the dollar value of any injunctive relief that Melaleuca might recover is in excess of \$75,000.00, exclusive of any interest and/or costs.

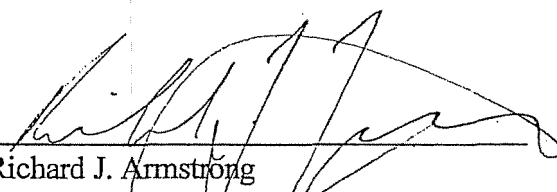
Admit _____

Deny _____

DATED this 6th day of August, 2009.

WOOD CRAPO LLC

By _____


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rjarmstrong@woodcrapo.com

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,

Plaintiff,

vs.

RICK FOELLER and NATALIE
 FOELLER,

Defendants.

***DEFENDANTS' SECOND SET OF
 INTERROGATORIES AND
 REQUESTS FOR PRODUCTION***

Civil No. CV-09-2616

The Honorable Jon J. Shindurling

Pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following Second Set of Interrogatories and Requests for Production to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Crapo LLC, 500 Eagle Gate Tower, 60 East South Temple Salt Lake City, Utah 84111.

DEFINITIONS

As used in these Interrogatories and the accompanying Requests for Production of Documents and Things, the terms listed below are defined as follows:

1. The terms "You," "Your," and "Plaintiff," mean Melaleuca, Inc., including any divisions, departments, subsidiaries, parents, affiliates and predecessors, and their respective present or former officers, directors, employees, owners, attorneys and agents, as well as consultants and any other persons acting or purporting to act on behalf of each such entity or person.

2. The term "Defendants" means Rick Foeller and/or Natalie Foeller as well as any other persons acting or purporting to act on their behalf.

3. The terms "person" or "persons" mean any natural person, corporation, partnership, association, organization, or group of natural persons, including but not limited to any employee, officer, director, consultant, independent contractor, agent, attorney or representative of any of them.

4. The words "document" or "documents" shall be used in their broadest sense and shall include, but are not limited to, any tangible thing capable of storing information, including but not limited to the following items, whether printed, typed or recorded or reproduced by hand or electronically, magnetically, optically or in any graphic manner of any kind or nature however produced or reproduced, whether sent or received or neither, whether within the actual or constructive possession, custody, or control of any agent, employee, consultant, or any other person acting or purporting to act on Your behalf, including drafts and copies bearing notations or marks not found on the original:

- a. all letters or other forms of correspondence or communication, including envelopes, notes, telefaxes, telegrams, cables, electronic mail messages, telex messages, and telephone messages (including reports, notes, notations and memoranda of or relating to any telephone conversations or conferences or personal interviews);
- b. all memoranda, research reports, speeches, reports, financial statements or reports, appraisals, estimates, notes, transcripts, tabulations, ledgers, studies, analyses, evaluations, projections, work papers of any type, corporate records or copies thereof, lists, comparisons, questionnaires, surveys, charts, graphs, maps, diagrams, summaries, tables, indexes, extracts, statistical records, compilations, reports and/or summaries of investigations, testing or analyses, marginal notations, desk calendars, appointment books, diaries, invoice receipts, contracts, insurance policies;
- c. all books, manuscripts (whether submitted for publication or not), advertisements (whether submitted for publication or not), press releases, magazines, newspapers, booklets, brochures, training materials, pamphlets, circulars, bulletins, notices, speeches, instructions, manuals, and articles;
- d. all minutes, transcripts, notes, presentation material, and memoranda of meetings;
- e. all photographs, drawings, microfilms, tapes or other recordings, punch cards, magnetic tapes, magnetic disks, optical or magneto-optical disks, print-

outs, and other data compilations from which information can be obtained, and any other information recorded in or on any medium whatsoever;

f. all contracts, agreements, understandings, representations, warranties; and

g. any and all drafts of the foregoing.

5. Unless otherwise specified herein, "relates to," "relating to," "refers to" and "referring to" shall be used interchangeably to mean concerning, comprising, involving, directed to, created by, sent to, received by, copied to, responsible for, or in any way logically or factually connected to the subject of the request.

6. To "identify" a person means to state the person's name, business address and telephone number and, in the case of a natural person, his home address, current occupation or job title, and current employer or business affiliation and telephone number or, in the case of a business enterprise, its form of organization, its state or country of incorporation if applicable, its address and principal place of business, executive officer or officers and telephone number.

7. To "identify" a document means to provide a brief description of the document sufficient to support a request for production, including the general nature of the subject matter, the date, identification of the author(s), addressee(s) and distributee(s), if any, and, if the document comprises or embodies an agreement, the parties to such agreement. In answer to interrogatories requiring identification of any document or documents, such document or documents may be produced by Plaintiff for inspection and copying along with the answers to these interrogatories in lieu of identification provided, however, the interrogatory or interrogatories to which the document responds must be specified.

8. To "identify" a thing means to provide a brief description of the thing sufficient to support a request for production, including any names, numbers, markings, or other identifying characteristics by which Plaintiff understands the thing to be identified.

9. To "locate" a document or thing means to state, by identifying a complete address, the present whereabouts of the document or thing, and to identify the one or more persons having possession, custody, or control thereof.

10. The words "and", "and/or", and "or" shall each be deemed to refer to both their conjunctive and disjunctive meanings. The words "all" and "any" shall mean "each and every" as well as "any one." The masculine gender shall be deemed to include the feminine and the neuter where appropriate, the singular, the plural, and vice versa.

11. The term "Policy 20" means Policy 20 governing "Non-Solicitation and Conflicts of Interest" of Plaintiff Melaleuca's *Statement of Policies and Definitions of Terms*, and which is the subject of this litigation. A true and correct copy of the current Policy 20 is attached hereto as Exhibit 1 and incorporated herein by this reference.

INSTRUCTIONS

1. These Interrogatories and the accompanying Requests for Production of Documents and Things are of continuing effect, and to the extent that at any time after answering thereof You become aware of or acquire additional information responsive to these Interrogatories and the accompanying Requests for Production of Documents and Things, such information shall be produced promptly.

2. References to natural persons shall be deemed to include, in addition to the person named, his or her agents or assigns, representatives, and attorneys, any partnership of which

such person is a member or general partner, and any other business entity in which such person has a controlling direct or indirect interest.

3. References to entities other than natural persons, including Plaintiff, shall be deemed to include, in addition to the entity named, its divisions, departments, subsidiaries, affiliates, parents, predecessors, present or former officers, directors, employees, agents, representatives, accountants and attorneys, and all other persons acting or purporting to act on behalf of each such entity or person.

4. If any interrogatory or request for documents and/or things cannot be complied with in full, it shall be complied with to the extent possible, with an explanation as to why full compliance is not possible.

5. In the event that any document identified in these interrogatories is subject to any claim of privilege (including work product), Plaintiff shall furnish a list identifying each such document by:

a. identifying the person who prepared or authored the document and, if applicable, the persons who sent the document and to whom the document was sent (including copies) and the dates on which the document was prepared and transmitted;

b. describing the nature of the document (e.g., letter, inter-office memorandum, telegram, notes, etc.) and, to the extent possible, the subject matter thereof;

c. identifying any and all attachments or enclosures appurtenant to such documents;

- d. stating briefly the nature of the privilege asserted; and
- e. producing any non-privileged portions, attachments or enclosures to any such privileged document, and identifying the portion(s) of the document to which privilege is claimed.
- f. When producing any document in machine readable form, Plaintiff will produce the means for reading said machine readable document, including software, hardware and any other equipment or apparatus required for that purpose, or, in the alternative, will provide complainant with a hard copy of said machine readable document.
- g. Each copy of any document that contains any markings not appearing on the original, or is an alteration of the original, shall be considered a separate document for purposes of these discovery requests.
- h. Records produced should be identified by category, location and form of record as ordinarily maintained in the course of business, and any indexes to such records should also be supplied.
- i. Where these Interrogatories call for the identification of a document or thing, it may be satisfied by the production of the document or thing and a statement identifying which of the documents produced is the document or thing in question
- j. Responses to these Interrogatories, unless specifically stated, shall cover the period from 1998 to the present.

SECOND SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the specific provision(s) in Policy 20 that you claim Defendants have violated.

INTERROGATORY NO. 2: State the name, address, and telephone number of each individual and/or entity you claim has knowledge and information relating to Plaintiff's allegations that Defendants have violated Policy 20.

INTERROGATORY NO. 3: State the name, address, and telephone number of each Melaleuca Independent Marketing Executive and/or Melaleuca Customer that has knowledge or information relating to Plaintiff's allegation that Defendants have violated Policy 20.

**SECOND REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS**

REQUEST NO. 1: All statements and drafts of statements of any individual relating to allegations that Defendants have violated Policy 20.

REQUEST NO. 2: All emails to and/or from Mike Connaughton that reference or relate in any way to Defendants and the allegations in this case that Defendants have violated Policy 20.

REQUEST NO. 3: All emails to and/or from McKay Christensen that reference or relate in any way to Defendants and the allegations in this case that Defendants have violated Policy 20.

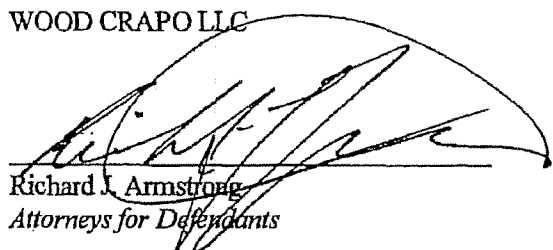
REQUEST NO. 4: All emails to and/or from Travis Garza that reference or relate in any way to Defendants and the allegations in this case that Defendants have violated Policy 20.

REQUEST NO. 5: All statements and other documents you rely on in claiming that

Laraine Agren, a former Melaleuca Independent Marketing Executive, has violated Policy 20.

DATED this 16th day of September, 2009.

WOOD CRAPO LLC



Richard J. Armstrong
Attorneys for Defendants

SAWPDATAPLEADINGFOELLER.MELALEUCASECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION.wpd

EXHIBIT 1

their Independent Melaleuca Business to bring it up to its potential status or offer to sell their business to another person on the condition that such person bring the business up to its potential status.

- (c) Completed original signed and notarized Organization Sale Request and Organization Purchase Request forms must be submitted to and accepted by Melaleuca.
- (d) The transferee of the business must have completed and submitted to Melaleuca an Independent Marketing Executive Agreement.
- (e) The transferee of the business has undergone, or will agree to undergo, such training and orientation as Melaleuca may require commensurate with the size of the business being purchased.
- (f) The transferor Marketing Executive and the Independent Melaleuca Business must have been in compliance with all of Melaleuca's policies and the terms of the Independent Marketing Executive Agreement for the entire twelve month period preceding the transfer including the month in which the transfer occurs.
- (g) Independent Melaleuca businesses that have or have had a total group volume of 5,000 Product Points or more may not be transferred to any other party as any such transfer would constitute the purchase of status or position.

19. Transfer from Original Organization

Marketing Executives and Customers may transfer from one Melaleuca organization to another only upon fulfillment of all of the following requirements:

- (a) The Marketing Executive or Customer seeking the organization change has submitted an Organization Change form with the original signatures of the seven Marketing Executives in the immediate seven generations above the Marketing Executive or Customer seeking the change. Faxes or photocopies of the executed Organization Change form will not be accepted;
- (b) A Marketing Executive seeking the organization change has no more than 10 Customers in his/her existing Marketing Organization and will have no more than 10 Customers in the Marketing Organization into which he/she is seeking to be moved;
- (c) The Marketing Executive or Customer seeking the organization change has paid to Melaleuca the applicable fee charged by Melaleuca for organization changes;
- (d) Melaleuca has approved the change in writing, which approval Melaleuca may withhold in its sole discretion.

20. Non-Solicitation and Conflicts of Interest

Marketing Executives are independent contractors and may be active in other business ventures while they are Marketing Executives for Melaleuca. However, to qualify for compensation under Melaleuca's Compensation Plan, Marketing Executives have the ongoing responsibility to service, supervise, motivate, train and assist the Marketing Executives in their Marketing Organizations. They also have the responsibility to promote Melaleuca products and the Melaleuca income opportunity. Melaleuca and its Marketing Executives have made a great investment in the establishment of organizations consisting of Customers and Marketing Executives. This constitutes one of Melaleuca's most valuable assets. Melaleuca reserves the right to cease paying compensation to any Marketing Executive who recruits any Melaleuca Customer or Marketing Executive to participate in another business venture. In order to protect the efforts of all Marketing Executives in building and maintaining their individual Marketing Organizations and Customer bases, and in order to protect Melaleuca's interest in the overall Customer base, Marketing Executives and all members of their Immediate Household are required to abide by the following policies:

- (a) Non-Solicitation of Melaleuca Customers and Marketing Executives:
 - (i) During the period that their Independent Marketing Executive Agreements are in force Marketing Executives and all members of their Immediate Household are prohibited from directly, indirectly or through a third party recruiting any Melaleuca Customers or Marketing Executives to participate in any other business venture.
 - (ii) For a period of twelve months after cancellation or termination for any reason of a Marketing Executive's Independent Marketing Executive Agreement, the Marketing Executive and all members of his or her Immediate Household are prohibited from directly, indirectly or through a third party recruiting to participate in any other business venture any Melaleuca Customers or Marketing Executives.
 - (iii) who were in the Marketing Executive's Marketing Organization or

Support Team at any time during the term of his or her association with Melaleuca;

- (2) with whom the Marketing Executive had contact during the term of his or her association with Melaleuca;
- (3) whose contact information (name, address, phone number or email address, etc.) the Marketing Executive or members of his or her Immediate Household has obtained at any time during the term of his or her association with Melaleuca; or
- (4) whose contact information (name, address, phone number or email address, etc.) the Marketing Executive or members of his or her Immediate Household obtained at any time from another person who obtained the information because of any other person's association with Melaleuca.

The prohibitions under clauses (a)(i) and (ii) above include but are not limited to, presenting or assisting in the presentation of other business ventures to any Melaleuca Customer or Marketing Executive or implicitly or explicitly encouraging any Melaleuca Customer or Marketing Executive to join any other business ventures. It is a violation of this policy to recruit a Melaleuca Customer or Marketing Executive to participate in another business venture even if the Marketing Executive does not know that the prospect is also a Melaleuca Customer or Marketing Executive. It is the Marketing Executive's responsibility to first determine whether the prospect is a Melaleuca Customer or Marketing Executive before recruiting the prospect to participate in another business venture. (Please refer specifically to the definition of "recruit" in the Definitions of Terms at the end of these Policies.)

- (b) During the period that their Independent Marketing Executive Agreements are in force, and for a period of twelve months after the cancellation or termination thereof for any reason, Marketing Executives and all members of their Immediate Household are further prohibited from the following:
 - (i) Producing any literature, tapes or promotional material of any nature (including but not limited to websites and emails) which is used by the Marketing Executive or any third person to recruit Melaleuca Customers or Marketing Executives to participate in another business venture;
 - (ii) Selling, offering to sell, or promoting any competing products or services to Melaleuca Customers;
 - (iii) Offering any non-Melaleuca products, services or business ventures in conjunction with the offering of Melaleuca products, services or income opportunity or at any Melaleuca meeting, seminar, launch, convention, or other Melaleuca function.
- (c) (i) Violation of any provision of this Policy 20 constitutes a Marketing Executive's voluntary resignation and cancellation of his/her Independent Marketing Executive Agreement, effective as of the date of the violation, and the forfeiture by the Marketing Executive of all commissions or bonuses payable for and after the calendar month in which the violation occurred.
- (ii) If Melaleuca pays any bonuses or commissions to the Marketing Executive after the date of the violation, all bonuses and commissions for and after the calendar month in which the violation occurred shall be refunded to Melaleuca.
- (iii) Melaleuca may seek and obtain from the violating Marketing Executive both injunctive relief and damages for violations of this Policy 20. Melaleuca may, at its option, elect to enforce this Policy by lawsuit in a court of competent jurisdiction in Idaho rather than by arbitration.
- (iv) In addition to being entitled to a refund of bonuses and commissions and to damages as described above, in the event a person or entity violates this Policy 20, Melaleuca and any Marketing Executive that experiences an adverse financial impact as a result of such person or entity's violation of this Policy 20 shall be entitled to an accounting and repayment of all profits, compensation, commissions, remunerations or other benefits which the person or entity directly or indirectly receives and/or may receive as a result of, growing out of, or in connection with any violation of this Policy. Such remedy shall be in addition to and not in limitation of any damages, or injunctive relief or other rights or remedies to which Melaleuca is or may be entitled at law or in equity.
- (d) Violations of this Policy 20 are especially detrimental to the growth and sales of other Marketing Executives' Independent Melaleuca Businesses and to Melaleuca's business. Consequently, Marketing Executives who have

knowledge that any Marketing Executive has violated this Policy must immediately report that information to Melaleuca's Policy Administration Department. The failure of a Marketing Executive to report such information to Melaleuca will also constitute a violation of this Policy. The names of those reporting violations of this Policy will be held in confidence.

21. Proprietary Information and Trade Secrets

By executing the Independent Marketing Executive Agreement, the Marketing Executive acknowledges that all information which is contained in the Marketing Executive's Monthly Business Report, including names, addresses and telephone numbers of Marketing Executives and Customers, is Melaleuca's proprietary trade secret information. The Marketing Executive agrees not to disclose such information to any third party (except to existing or prospective Melaleuca Marketing Executives or Customers for the purpose of promoting Melaleuca products and business opportunity) or to utilize such information for the purpose of promoting any other business opportunity at any time, whether during the term of his/her association with Melaleuca or thereafter. The Marketing Executive acknowledges that such proprietary information is of such character as to render it unique and that disclosure or use thereof in violation of this provision will result in irreparable damage to Melaleuca and to Independent Melaleuca Businesses. Melaleuca and its Marketing Executives will be entitled to injunctive relief to prevent violation of this policy. If litigation or arbitration is required to obtain injunctive relief or to recover damages, the prevailing party shall be entitled to an award of attorney's fees and expenses.

22. The Enroller

- (a) A Marketing Executive who is the Enroller of a new Customer or Marketing Executive may not list another Marketing Executive who did not participate in the contact or the presentation as the Enroller of such new Customer or Marketing Executive. Regardless of where a Customer or Marketing Executive is placed in a Marketing Organization, the actual Enroller of such Customer or Marketing Executive must be listed as the Enroller on the Customer Membership Agreement.
- (b) The Enroller and any other Marketing Executives involved in the recruiting and enrollment process may use only Melaleuca's products and its compensation plan and their personal commitment to help the new Marketing Executive build his or her business as an inducement to enroll. Marketing Executives may not enter into special deals with an Enrollee, including, but not limited to, promises of the payment of money or roll ups.

23. Supervisory and Leadership Functions

Marketing Executives' compensation is based on sales of product to the End Consumer. To qualify for this compensation Marketing Executives have the ongoing responsibility to promote the Melaleuca business opportunity, to support Melaleuca's policies, programs and personnel, and to service, supervise, motivate and train the Marketing Executives in their Marketing Organization to sell and market Melaleuca products and promote the Melaleuca business opportunity. Any effort by a Marketing Executive to convince or entice any Customer or Marketing Executive to discontinue or diminish purchasing Melaleuca products, to move from one Melaleuca Marketing Organization to another, to discontinue or diminish efforts to promote the Melaleuca business opportunity, or to promote or pursue another direct selling opportunity, or to disparage Melaleuca, or its products, marketing plan, management team or other personnel is a violation of the Marketing Executive's leadership responsibility and a violation of this policy.

24. Excess Inventory Purchases Prohibited

The Melaleuca marketing program is built upon sales to the End Consumer. Products representing at least 70% of a Marketing Executive's monthly Organization Product Points must be sold to End Consumers each month. Any device or scheme whereby a Marketing Executive directly or through a third party purchases excess product solely for purposes of qualifying for bonuses or commissions constitutes fraud on the part of the Marketing Executive.

25. Selling in Stores

Melaleuca is in strong support of home-based businesses and personal product presentations. To maintain a standard of fairness, Marketing Executives may not display or sell Melaleuca products in drug stores, health food stores or grocery stores. Any display of Melaleuca products to the public must be tasteful and professional. A Marketing Executive may not display or sell Nicole Miller products in any type of retail setting.

26. Media Inquiries

It is Melaleuca's policy to have a single spokesperson handle all inquiries from the media and all media relations. Therefore, Marketing Executives may not, for any reason, discuss their Independent Melaleuca Business with the media, nor act as spokespersons for Melaleuca nor talk to the media regarding Melaleuca, its Compensation Plan, its products or services. It is a violation of this policy to provide any information to the media, regardless of whether the information is positive or negative, accurate or inaccurate. All inquiries from the media (whether radio, television or print) must be referred to Melaleuca.

27. Checks and Monthly Business Reports

Commission and bonus checks are generally mailed by Melaleuca to Marketing Executives on or about the 15th day of each month for commissions and bonuses earned during the previous month. When the 15th day of the month falls on a weekend or holiday, checks will generally be mailed on the next business day. Each Marketing Executive qualifying for a commission or bonus will receive a Monthly Business Report showing the status of each Customer and Marketing Executive in his/her Marketing Organization.

The Monthly Business Report will show the calculation of the Marketing Executive's commission and bonus in detail. Marketing Executives should use their Monthly Business Report as a tool to manage, supervise and train the members of their Marketing Organizations. The information contained in Business Reports is Melaleuca's proprietary trade secret information, and Marketing Executives are prohibited from disseminating the information contained therein. See Policy 21 for further detail regarding Marketing Executives' obligations with respect to such proprietary trade secret information. A data processing fee is charged each Marketing Executive for generating and maintaining computerized Monthly Business Reports.

Commission and bonus checks which remain uncashed for more than 180 days will not be honored and the amount of the check, less a processing fee of \$15.00^{US}/\$22.50^{CA} and a bank cancellation/stop payment fee of \$30.00^{US}/\$45.00^{CA}, will be credited to the Marketing Executive's account, which credit may be used towards future purchases made by the Marketing Executive. If a Marketing Executive's account is inactive and it is necessary to notify the Marketing Executive of the credit on account, a service charge of \$10.00^{US}/\$15.00^{CA} will be deducted from the account for each notice sent.

28. Purchases for Other Persons

A Marketing Executive may not order or pay for products for Customers without such Customer's express authorization and agreement to reimburse the Marketing Executive for such product.

29. Restrictions on International Marketing (United States and Canada)

Marketing Executives enrolled in the United States and Canada are authorized to sell Melaleuca products and to enroll Customers and Marketing Executives in the United States and Canada. In all other countries in which Melaleuca or its affiliates are authorized to conduct business Marketing Executives may only enroll Customers and Marketing Executives pursuant to Melaleuca's International Sponsorship Program. Marketing Executives and Customers may not ship or sell Melaleuca products across any international border for the purpose of resale, except the U.S./Canadian border provided the products are appropriately labeled for the country of their destination. Marketing Executives and Customers may not sell, give, transfer, import, export or distribute Melaleuca products or sales aids in any country, other than the United States and Canada, nor provide products to any individual who the Marketing Executive or Customer knows or has reason to believe is exporting products to another country.

29.1. Restrictions on International Marketing (Melaleuca of the Caribbean)

Marketing Executives enrolled under Melaleuca of the Caribbean are authorized to enroll Customers and Marketing Executives in any country in which Melaleuca of the Caribbean is authorized to conduct business. In all other countries in which Melaleuca or its affiliates are authorized to conduct business, Marketing Executives may only enroll Customers and Marketing Executives pursuant to Melaleuca's International Sponsorship Program. Marketing Executives and Customers may not ship or sell Melaleuca products across any international border for the purpose of resale. Marketing Executives and Customers may not sell, give, transfer, import, export or distribute Melaleuca products or sales aids in any other country, nor provide products to any individual or entity who the Marketing Executive or Customer knows or has reason to believe is exporting products to another country.

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rjarmstrong@woodcrapo.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)	
	)	CERTIFICATE OF SERVICE OF
Plaintiff,	)	DEFENDANTS' SECOND SET OF
	)	INTERROGATORIES AND
vs.	)	REQUESTS FOR PRODUCTION
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	The Honorable Jon J. Shindurling
Defendants.)	
)	
)	
)	
)	

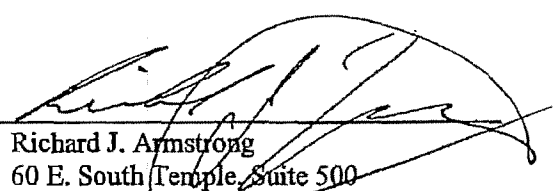
I HEREBY CERTIFY that on the 16th day of September, 2009, a true and correct copy of **DEFENDANTS' SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION** was faxed to the following:

Curt R. Thomsen
T. Jason Wood
THOMSEN STEPHENS LAW OFFICES, P.L.L.C.
2635 Channing Way
Idaho Falls, Idaho 83404
Attorneys for Plaintiff

DATED this 16th day of September, 2009.

WOOD CRAPO LLC

By



Richard J. Armstrong
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Salt Lake City, Utah 84111
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rjarmstrong@woodcrapo.com
Attorneys for Defendants

S:\WPDATA\PLEADING\FOELLER.MELALEUCA.CERTIFICATE OF SERVICE.DISCOVERY.wpd

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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,

Plaintiff,

vs.

RICK FOELLER and NATALIE
 FOELLER,

Defendants.

)
)
) ***DEFENDANTS' THIRD REQUEST***
) ***FOR PRODUCTION OF DOCUMENTS***
) ***AND THINGS***

)
) Civil No. CV-09-2616

) The Honorable Jon J. Shindurling
)
)
)
)

Pursuant to Rule 34 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following *Third Request for Production of Documents and Things* to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca, Inc. within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Crapo LLC, 500 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111.

DEFINITIONS

As used in this *Third Request for Production of Documents and Things*, the terms listed below are defined as follows:

1. The terms "You," "Your," and "Plaintiff," mean Melaleuca, Inc., including any divisions, departments, subsidiaries, parents, affiliates and predecessors, and their respective present or former officers, directors, employees, owners, attorneys and agents, as well as consultants and any other persons acting or purporting to act on behalf of each such entity or person.

2. The term "Defendants" means Rick Foeller and/or Natalie Foeller as well as any other persons acting or purporting to act on their behalf.

3. The terms "person" or "persons" mean any natural person, corporation, partnership, association, organization, or group of natural persons, including but not limited to any employee, officer, director, consultant, independent contractor, agent, attorney or representative of any of them.

4. The words "document" or "documents" shall be used in their broadest sense and shall include, but are not limited to, any tangible thing capable of storing information, including but not limited to the following items, whether printed, typed or recorded or reproduced by hand or electronically, magnetically, optically or in any graphic manner of any kind or nature however produced or reproduced, whether sent or received or neither, whether within the actual or constructive possession, custody, or control of any agent, employee, consultant, or any other person acting or purporting to act on Your behalf, including drafts and copies bearing notations or marks not found on the original:

a. all letters or other forms of correspondence or communication, including envelopes, notes, telefaxes, telegrams, cables, electronic mail messages, telex messages, and telephone messages (including reports, notes, notations and memoranda of or relating to any telephone conversations or conferences or personal interviews);

b. all memoranda, research reports, speeches, reports, financial statements or reports, appraisals, estimates, notes, transcripts, tabulations, ledgers, studies, analyses, evaluations, projections, work papers of any type, corporate records or copies thereof, lists, comparisons, questionnaires, surveys, charts, graphs, maps, diagrams, summaries, tables, indexes, extracts, statistical records, compilations, reports and/or summaries of investigations, testing or analyses, marginal notations, desk calendars, appointment books, diaries, invoice receipts, contracts, insurance policies;

c. all books, manuscripts (whether submitted for publication or not), advertisements (whether submitted for publication or not), press releases, magazines, newspapers, booklets, brochures, training materials, pamphlets, circulars, bulletins, notices, speeches, instructions, manuals, and articles;

d. all minutes, transcripts, notes, presentation material, and memoranda of meetings;

e. all photographs, drawings, microfilms, tapes or other recordings, punch cards, magnetic tapes, magnetic disks, optical or magneto-optical disks, print-

outs, and other data compilations from which information can be obtained, and any other information recorded in or on any medium whatsoever;

f. all contracts, agreements, understandings, representations, warranties;
and

g. any and all drafts of the foregoing.

5. Unless otherwise specified herein, "relates to," "relating to," "refers to" and "referring to" shall be used interchangeably to mean concerning, comprising, involving, directed to, created by, sent to, received by, copied to, responsible for, or in any way logically or factually connected to the subject of the request.

6. The words "and", "and/or", and "or" shall each be deemed to refer to both their conjunctive and disjunctive meanings. The words "all" and "any" shall mean "each and every" as well as "any one." The masculine gender shall be deemed to include the feminine and the neuter where appropriate, the singular, the plural, and vice versa.

INSTRUCTIONS

1. These Requests for Production of Documents and Things are of continuing effect, and to the extent that at any time after answering thereof You become aware of or acquire additional information responsive to these Requests for Production of Documents and Things, such information shall be produced promptly.

2. References to natural persons shall be deemed to include, in addition to the person named, his or her agents or assigns, representatives, and attorneys, any partnership of which such person is a member or general partner, and any other business entity in which such person has a controlling direct or indirect interest.

3. References to entities other than natural persons, including Plaintiff, shall be deemed to include, in addition to the entity named, its divisions, departments, subsidiaries, affiliates, parents, predecessors, present or former officers, directors, employees, agents, representatives, accountants and attorneys, and all other persons acting or purporting to act on behalf of each such entity or person.

4. If any request for documents and/or things cannot be complied with in full, it shall be complied with to the extent possible, with an explanation as to why full compliance is not possible.

5. In the event that any document identified in these requests is subject to any claim of privilege (including work product), Plaintiff shall furnish a list identifying each such document by:

- a. identifying the person who prepared or authored the document and, if applicable, the persons who sent the document and to whom the document was sent (including copies) and the dates on which the document was prepared and transmitted;
- b. describing the nature of the document (e.g., letter, inter-office memorandum, telegram, notes, etc.) and, to the extent possible, the subject matter thereof;
- c. identifying any and all attachments or enclosures appurtenant to such documents;
- d. stating briefly the nature of the privilege asserted; and

e. producing any non-privileged portions, attachments or enclosures to any such privileged document, and identifying the portion(s) of the document to which privilege is claimed.

f. When producing any document in machine readable form, Plaintiff will produce the means for reading said machine readable document, including software, hardware and any other equipment or apparatus required for that purpose, or, in the alternative, will provide complainant with a hard copy of said machine readable document.

g. Each copy of any document that contains any markings not appearing on the original, or is an alteration of the original, shall be considered a separate document for purposes of these discovery requests.

h. Records produced should be identified by category, location and form of record as ordinarily maintained in the course of business, and any indexes to such records should also be supplied.

**THIRD REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS**

REQUEST NO. 1: All documents relating to any and all terminations of any agreements between Gwen and Lidell Miles ("Miles") and Melaleuca, Inc., including but not limited to a termination of the Miles' marketing executive agreement in 2008.

REQUEST NO. 2: All documents relating to any and all agreements between the Miles and Melaleuca, Inc., including but not limited to any renewal of any marketing executive agreement.

REQUEST NO. 3: All signed amnesty agreements between any and all marketing executives and Melaleuca, Inc., for the time period between October 2009 and the present, wherein marketing executives at Melaleuca were asked to disclose involvement with business opportunities other than Melaleuca, Inc.

REQUEST NO. 4: All emails, letters, internal memoranda, and other documents showing Johnny Morgison as a sender or recipient, and which relate in any way to Defendants Rick and Natalie Foeller for the time period between September 2008 and the present.

REQUEST NO. 5: All tape recordings and/or other audio or video recordings of any and all Melaleuca presentations at the October 2009 convention in San Diego, California, including but not limited to any recorded speeches or other presentations depicting Frank VanderSloot.


REQUEST NO. 6: All tape recordings and/or other audio or video recordings of Defendant Rick Foeller and/or Defendant Natalie Foeller.

REQUEST NO. 7: Any and all documents evidencing, showing, explaining, or otherwise relating to any changes, amendments, or modifications to the compensation plan at

Melaleuca, Inc., for the time period between January 1, 2005 through the present. For purposes of this request, "compensation plan" means "the plan offered by Melaleuca which sets forth the compensation provided to Marketing Executives for the continuing building, promoting, training, motivation, servicing and development of their Independent Melaleuca Businesses," and which is defined at page 48 of Melaleuca's "*Statement of Policies and Definitions of Terms.*"

DATED this 6th day of January, 2010.

WOOD CRAPO LLC



Richard J. Armstrong
Attorneys for Defendants

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY

MELALEUCA, INC., an Idaho corporation,)

Plaintiff,)

vs.)

RICK FOELLER and NATALIE)
FOELLER,)

Defendants.)

***DEFENDANTS' THIRD SET OF
INTERROGATORIES AND FOURTH
REQUESTS FOR PRODUCTION***

Civil No. CV-09-2616

The Honorable Jon J. Shindurling

Pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following Third Set of Interrogatories and Fourth Requests for Production to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Jenkins LLC, 500 Eagle Gate Tower, 60 East South Temple Salt Lake City, Utah 84111.

THIRD SET OF INTERROGATORIES

INTERROGATORY NO. 1: State the specific dollar amount of damages you claim were caused by Defendants' alleged violations of Policy 20.

INTERROGATORY NO. 2: State the name, address, and telephone number of any experts you have designated or intend to designate to testify on Melaleuca's behalf regarding any damages in any currently pending litigation or arbitration where at least one of the claims involves allegations of Policy 20 violations and/or unlawful recruiting of Melaleuca's marketing executives.

INTERROGATORY NO. 3: In relation to any currently pending litigation or arbitration, state the name of the case, case number, and court where you have designated or intend to designate an expert witness to testify on your behalf relating to the issue of damages arising from alleged violations of Policy 20 and/or unlawful recruiting of Melaleuca's marketing executives.

INTERROGATORY NO. 4: In relation to this case, state the name, address, and telephone number of each expert witness you intend to designate pursuant to Idaho R. Civ. P. 26(b)(4).


FOURTH REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

REQUEST NO. 1: Please produce all expert reports that have been prepared in relation to the experts and/or matters identified in Interrogatory Nos. 2-4 above.

REQUEST NO. 2: Please produce any and all correspondence, including e-mails and other correspondence, between Melaleuca on one hand and the expert(s) identified in Interrogatory No. 4 above on the other.

DATED this 25th day of January, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Attorneys for Defendants

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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY**

MELALEUCA, INC., an Idaho corporation,)	
)	
Plaintiff,	)	<i>DEFENDANTS' FOURTH REQUEST</i>
	)	<i>FOR PRODUCTION</i>
)	
vs.)	
)	
RICK FOELLER and NATALIE	)	Civil No. CV-09-2616
FOELLER,)	
	)	The Honorable Jon J. Shindurling
Defendants.)	
)	

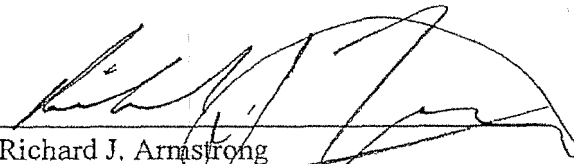
Pursuant to Rule 34 of the Idaho Rules of Civil Procedure, Defendants Rick Foeller and Natalie Foeller ("Defendants"), propound the following Fourth Request for Production to Plaintiff Melaleuca, Inc. ("Melaleuca"), to be answered and produced by Melaleuca within 30 days from the date hereof or within such shorter period as the Court shall order. The requested documents are to be produced at the offices of Wood Jenkins LLC, 500 Eagle Gate Tower, 60 East South Temple Salt Lake City, Utah 84111.

FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Please produce a copy of any all settlement agreements reached between parties in the civil litigation entitled *Melaleuca, Inc. v. Max International, LLC, et al.*, Case Number 4:09-CV-00572, in the United States District Court for the District of Idaho, Eastern Division., including but not limited to any and all settlement agreements between Ken Dunn on one hand and Melaleuca, Inc. on the other, and Max International, LLC on one hand and Melaleuca, Inc. on the other.

DATED this 3rd day of March, 2011.

WOOD JENKINS LLC



Richard J. Armstrong
Attorneys for Defendants

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EXHIBIT B

C E R T I F I C A T E

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of
NATALIE FOELLER was taken before me, Linda Van
Tassell, Registered Diplomate Reporter and Notary
Public in and for the State of Utah.

That the said witness was by me, before
examination, duly sworn to testify the truth, the
whole truth, and nothing but the truth in said
cause.

That the testimony was reported by me in
Stenotype, and thereafter transcribed by computer
under my supervision, and that a full, true, and
correct transcription is set forth in the foregoing
pages, numbered 5 through 323 inclusive.

I further certify that I am not of kin or
otherwise associated with any of the parties to
said cause of action, and that I am not interested
in the event thereof.

WITNESS MY HAND and official seal at Salt Lake
City, Utah, this 4th day of February, 2010.


Linda Van Tassell, RDR/CRR

My commission expires:
November 27, 2011



NOTARY PUBLIC
LINDA VAN TASSELL
333 Rio Grande St.
Salt Lake City, UT 84101
My Commission Expires
November 27, 2011
STATE OF UTAH